(11)

No. 91-17-CFX
Status: GRANTED

Title: Estate of Floyd Cowart, Petitioner
v.
Nicklos Drilling Company, etal.

Docketed:
June 27, 1991

Court: United States Court of Appeals
for the Fifth Circuit

See also:
91-284

Counsel for petitioner: Frischhertz,Lloyd N.

Counsel for respondent: Lewis Jr.,H. Lee, Solicitor General

NOTE: 070291 Dee states counsel to be admitted
071291

Entry	Date	Note	Proceedings and Orders
20	Feb 20 1991	G	Motion of Petroleum Helicopters, Inc., et al. for leave to file a brief as amici curiae filed.
1	Jun 27 1991	G	Petition for writ of certiorari filed.
2	Jul 18 1991		Waiver of right of respondents Nicklos Drilling, et al. to respond filed.
3	Jul 24 1991		DISTRIBUTED. September 30, 1991
5	Aug 6 1991		Order extending time to file response to petition until September 3, 1991.
6	Sep 3 1991	X	Brief of respondent United States in opposition filed.
7	Sep 25 1991		REDISTRIBUTED. October 11, 1991
8	Oct 9 1991	P	Response requested -- DHS. (Due November 11, 1991)
9	Nov 7 1991		Brief of respondents Nicklos Drilling, et al. in opposition filed.
10	Nov 13 1991		REDISTRIBUTED. November 27, 1991
12	Dec 2 1991		REDISTRIBUTED. December 6, 1991
13	Dec 9 1991		Petition GRANTED.
			**********
16	Jan 17 1992		Record filed.
		*	Partial proceedings and briefs U. S. Court of Appeals - Fifth Circuit.
14	Jan 23 1992		Joint appendix filed.
15	Jan 23 1992		Brief of petitioner Estate of Cowart filed.
27	Feb 5 1992		SET FOR ARGUMENT WEDNESDAY, MARCH 25, 1992. (2ND CASE).
17	Feb 21 1992		CIRCULATED.
18	Feb 21 1992	X	Brief of respondents Nicklos Drilling, et al. filed.
19	Feb 21 1992	X	Brief of respondent United States filed.
23	Feb 24 1992	G	Motion of the Solicitor General for divided argument filed.
21	Feb 25 1992	G	Motion of National Association of Stevedores, et al. for leave to file a brief as amici curiae filed.
24	Mar 2 1992		Motion of the Solicitor General for divided argument GRANTED.
25	Mar 9 1992		Motion of Petroleum Helicopters, Inc., et al. for leave to file a brief as amici curiae GRANTED.
26	Mar 9 1992		Motion of National Association of Stevedores, et al. for leave to file a brief as amici curiae GRANTED.
28	Mar 18 1992	X	Reply brief of petitioner Estate of Cowart filed.
29	Mar 19 1992		Record filed.
		*	Benefits Review Board record.

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No. 91-17-CFX

Entry	Date	Note	Proceedings and Orders
30	Mar 25 1992		ARGUED.

(1)

91-17

NO. .....

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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THE ESTATE OF FLOYD COWART

Petitioner

VERSUS

NICKLOS DRILLING COMPANY, and

COMPASS INSURANCE COMPANY

Respondents

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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Respectfully Submitted,

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QUESTION PRESENTED FOR REVIEW

Whether, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., a compromise by a claimant with a third party tortfeasor, without the express written approval of his employer/carrier, serves to preclude said claimant from future compensation benefits, irrespective of whether the employer/carrier knew of the compromise, and irrespective of whether the employer/carrier was either paying claimant compensation benefits, or was under judicial mandate to pay such compensation benefits, at the time of the compromise.

LIST OF PARTIES

A. The following are entities interested in the outcome of this case.

1. Compass Insurance Company (Carrier)

2. Nicklos Drilling Company (Employer)

3. Estate of Floyd Cowart (Claimant)

4. Director, Office of Workers' Compensation Programs
United States Department of Labor

5. Lloyd N. Frischhertz, Seelig, Cosse', Frischhertz & Poulliard (Attorney for Claimant)

B. The following are names of opposing law firms and/or counsel in this case:

1. Mr. H. Lee Lewis, Jr., of GRIGGS & HARRISON, Post Office Box 4616, Houston, Texas, 77210-4616

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In The
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THE ESTATE OF FLOYD COWART
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OPINIONS BELOW

The Decision and Order of Administrative Law Judge Parlen L. McKenna in this case was rendered on November 25, 1986, and is published at 19 BRBS 457.

The Opinion of the Benefits Review

Board was rendered on October 31, 1989 and is published at 23 BRBS 42.

The Judgment of the United States Court of Appeals for the Fifth Circuit was rendered on August 9, 1990, and is published at 907 F.2d 1552.

The Decision of the United States Court of Appeals to allow rehearing en banc was issued on November 6, 1990.

The Judgment of the United States Court of Appeals, en banc, was rendered on March 29, 1991, and is published at 927 F.2d 828.

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STATEMENT OF JURISDICTION

The opinion and judgement of the en banc panel of the United State Court of Appeals for the Fifth Circuit was rendered on March 29, 1991. This

petition for writ of certiorari was filed within 90 days of March 29, 1991, as required by 28 U.S.C. 2101(c) and Rule 13.1 of the Supreme Court Rules. Jurisdiction is invoked under the provisions of 28 U.S.C. 1254(1).

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STATUTE INVOLVED

The Statute involved in this case is Section 933(g) of the Longshore and Harbor Workers' Compensation Act which reads in its entirety:

(g) Compromise obtained by person entitled to compensation.

(1) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter the employer shall be

liable for compensation determined in subsection (f) of this section only if written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within days after such compromise is made.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. 933(g).

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STATEMENT OF THE CASE

(i) Disposition below:

This case arises out of a claim by Floyd Cowart for benefits pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, et. seq. Cowart sustained an injury in the course and scope of his employment with Nicklos Drilling Company.

Administrative Law Judge, Parlen L. McKenna, entered an order on November 25, 1986, awarding Cowart benefits. 19 B.R.B.S. 457. Nicklos Drilling Company appealed to the Benefits Review Board. On October 31, 1989, the Board affirmed Judge McKenna's award. 23 B.R.B.S. 42.

On August 9, 1990, a three judge panel of the United States Court of Appeals for the Fifth Circuit reversed

the findings of Judge McKenna as affirmed by the Board. Cowart timely petitioned the Fifth Circuit for a Rehearing En Banc, which was granted on November 6, 1990. On March 31, 1991, the Fifth Circuit, ruling en banc, affirmed the panel's decision.

(ii) Statement of Facts

On July 20, 1983, Floyd Cowart was injured while working for Nicklos Drilling Company on Rig 81, a Transco Exploration Company platform located on the outer continental shelf. Cowart's injury occurred when a mud tank crushed his hand during movement of the tank by a crane. In addition to the crush injury, Cowart also lost the distal half of his thumb. After several months of treatment, Cowart reached maximum medical

improvement on May 21, 1984. Accordingly, on May 25, 1984, Cowart's physician released him to return to work, assessing a forty percent partial disability rating, based on the loss of the distal half of his thumb and residual synovitis in the flexor tendons.

Immediately after his injury, Cowart made a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq. Cowart received temporary total disability benefits from July 21, 1983, the date of his accident, through May 21, 1984, the date he reached maximum medical improvement. As Cowart had sustained a scheduled injury under Section 8(c)(6) of the Act, he was automatically entitled to two thirds of his average weekly wage for

a seventy five week period, commencing on the date of maximum medical improvement; May 22, 1984. While Nicklos acknowledged liability for these schedule benefits, and indeed was instructed by the Director to pay said benefits; Nicklos never paid these benefits to Cowart.

Meanwhile, Cowart had filed suit in the United States District Court for the Eastern District of Louisiana against Transco, the third party and owner of the rig, for its negligence in causing the accident. On July 1, 1985, more than thirteen months after the schedule payments were supposed to have started, Cowart settled his third party claim with Transco. This settlement was funded entirely by Nicklos pursuant to an indemnification agreement between Nicklos

and Transco. Thus, Nicklos not only had notice of the settlement between Cowart and Transco, but actually paid the settlement to Cowart.

Cowart's compensation claim under the Act proceeded to administrative hearing on November 25, 1986. Nicklos argued that Cowart forfeited his claim for compensation because Cowart failed to obtain Nicklos' written approval of the settlement, pursuant to Section 933(g) of the Act. Administrative Law Judge Parlen L. McKenna held that Section 933(g) did not preclude compensation benefits under the fact situation at bar; Nicklos' participation in the settlement agreement sufficed as notice under Section 933(g)(2) irrespective of the fact that Nicklos' written approval was not

garnered.

The Benefits Review Board affirmed McKenna's decision and the matter was appealed to the United States Court of Appeals for the Fifth Circuit. On August 9, 1990, a panel reversed the Administrative Law Judge and the Benefits Review Board, holding:

> "... there are no exceptions whatever to the "unqualified" language of Section 933. Rather, "the employer shall be liable for compensation ... only if written approval of the settlement is obtained from the employer and the employer's carrier ..."

As this holding conflicted with prior precedent of the Fifth Circuit, Cowart filed for Rehearing En Banc which was granted on November 6, 1990. Sitting en banc, the Fifth Circuit affirmed the panel's decision on March 31, 1991.

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ARGUMENT

Introduction

The intent of the Longshore and Harbor Workers' Compensation Act, 933 U.S.C. 901, et. seq. is to compensate injured longshore and harbor workers for injuries suffered in the course and scope of their employment. Congress intended, and the Supreme Court has held, that the Act should be construed in order to further its purpose of compensating longshoremen and harbor workers, "and in a way which avoids harsh and incongruous results." Voris v. Eikel, 346 U.S. 328, 333 (1953); Northeast Marine Terminal Company, Inc. v. Caputo, 432 U.S. 249, 268 (1977).

In keeping with this legislative intent, Section 933(g) of the Act

provides that the employer be notified prior to any settlement between an injured worker and a third party. As the Fifth Circuit succinctly pointed out in Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644 (5th Cir. 1986), the legislative intent behind Section 933(g) was twofold, namely:

> 1). To protect the employer's right to directly recover its compensation liability from the third party tortfeasor; and
>
> 2). To protect the employer's statutory right to a set-off against its compensation liability for any amount received by the employee from the third party tortfeasor.
>
> Collier, supra at 646.

This intent, enunciated by the Collier court, is clearly in keeping

within the overall intent of the Act as set forth in Voris, supra and Northeast Marine, supra. Section 933(g) was enacted to encourage employers to pay their compensation liability, by preserving those employer's right to recover such payments from a third party tortfeasor. By requiring notification of any third party settlement, Section 933(g) ensures employers that settlement will not be confected without their approval, thereby alleviating the employers' fear that they will not be recompensed for compensation benefits paid by themselves, but ultimately deemed owed by a third party.

The question that arises is whether Section 933(g) was intended to provide equal protection, both to those employers

who are fulfilling the intent of the Act by paying the claimant compensation benefits at the time of the third party settlement; and those employers who are not fulfilling the intent of the act by withholding such compensation benefits. By protecting those employers who are paying the claimant compensation benefits at the time of settlement, Section 933(g) encourages employers to fulfill their obligation under the Act. Interpreting Section 933(g) to provide equal protection to those employers who are withholding such compensation benefits would not only circumvent Congress' intent to encourage employers to promptly compensate longshore and harbor workers, but would have the converse effect of encouraging employers to withhold

compensation benefits until such time as they are judicially ordered to pay such benefits. In any case in which the possibility of settlement arose, the employer could withhold compensation benefits, and withhold written approval of a settlement agreement, in hopes of ultimately avoiding the payment of any compensation whatsoever. There would be no means to protect a claimant against such withholding. Such an interpretation is clearly contrary to the underlying intent of the Act.

An alternative interpretation, and the one urged by petitioner in the captioned matter, is to read Section 933(g) as providing different levels of protection for the two classes of employers. Under this interpretation,

Section 933(g) would be interpreted as requiring written approval by an employer who was paying compensation at the time of the third party settlement, and as requiring notification to an employer who was not paying compensation at the time of the third party settlement. Such an interpretation would serve to reinforce the underlying intent of Section 933(g), i.e., encouraging employers to promptly pay compensation benefits, by affording such employers greater protection; while conversely mitigating the potential abuse of Section 933(g), by affording lesser protection to those employers who are not paying compensation benefits.

The precise issue before this Court is whether a compromise by a claimant with a third party tortfeasor, without

the express written approval of his employer/carrier, serves to preclude said claimant from future compensation benefits, irrespective of whether the employer/carrier knew of the compromise, and irrespective of whether the employer/carrier was either paying claimant compensation benefits, or was under judicial mandate to pay such compensation benefits, at the time of the compromise.

The Fifth Circuit has now unilaterally overruled over fifteen years of administrative and Benefits Review Board decisions. Some of those decisions overruled had been affirmed, by both the Fifth and Ninth Circuits, creating a clear conflict in the law of the various circuits. (This writer knows of no other

federal circuits which have ruled on the issue). Further, the Fifth Circuit's decision is contrary to the interpretation of Section 933(g) given by the Director, Office of Worker's Compensation Programs, an opinion that has been accorded judicial deference. Finally, the Fifth Circuit's decision ignores the clear wording of Section 933(g), as interpreted through the rules of statutory construction enunciated by this Court.

The effect of the Fifth Circuit's decision is sure to be devastating to literally hundreds of thousands of claimants, past, pending and future. Indeed, since the rendering of this decision, one Sixth Compensation District employer, Ingalls Shipbuilding, has moved

to dismiss over 3,000 pending claims. The hardest hit claimant's will be those with occupational diseases; the Fifth Circuit decision will render their ability to pursue both compensation and tort remedies simultaneously, a right guaranteed under the Act, virtually nonexistent. These, and other claimant's affected by the decision, will be stripped of their right to compensation, and thereby be thrust upon the already overwhelming number of disabled being currently supported by this country's welfare and social security systems.

History of 933(g):

Any case involving statutory interpretation necessarily begins with a discussion of the history of the statute. From 1927 until 1972, Section 933(g) read

substantially as follows:

> "(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if such compromise is made with his written approval."
>
> 44 Stat. 1441; 73 Stat. 392.

There is a dearth of cases construing Section 933(g) during this period. The leading cases are Chapman v. Hoage, 296 U.S. 526, 56 S.Ct. 333 (1936) (933(g) does not bar a claim for compensation unless the carrier is actually prejudiced by the claimant's failure to prosecute his third party action); Banks v. Chicago Grain Trimmers Association, 390 U.S. 459, 88 S.Ct. 1140

(1968) (claimant's consent to a court ordered remittitur is not a compromise within the meaning of 933(g) because the employer's interest was protected by the trial court in ordering the remittitur); and Bell v. O'Hearne, 284 F.2d 777 (4th Cir. 1960) (after claimant's third party action was tried to judgment, settling for a lesser amount was not a compromise as long as the employer was credited for the full amount, because the employer's interest was fully protected).

The paucity of court litigation involving Section 933(g) prior to 1972 is not unusual given the primary purpose of the 1972 amendments to the Act. The primary purpose of the 1972 amendments was to limit the available actions in tort for persons covered by the Act in

exchange for increasing compensation benefits. Prior to 1972, claimant's were allowed a greater variety of third party tort actions against a larger class of potential defendant's, including the claimant's employer. Consequently, claimant's third party actions usually settled for a much greater amount than similar actions following the amendment's.

In 1972 Section 933(g) was amended to provide in pertinent part:

> (g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter the employer shall be liable for compensation determined in subsection (f) of this section only if written approval of such compromise is obtained from the employer and its insurance carrier

> by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within days after such compromise is made.

33 U.S.C. 933(g).

Since 1972, the above underlined portion of Section 933(g) has been interpreted by numerous administrative and judicial tribunals, with the same result.

The issue was first faced by the administrative law judge in O'Leary v. Southeast Stevedore Company, 5 BRBS 16 (1976). In O'Leary the administrative law judge noted that Section 933(g) "presuppose[s] that compensation is not only payable under the Act, but that both claimant and respondent accept that compensation is payable." Id. at 24.

The decision continued:

> "Only when the decision of the Benefits Review Board and the Order of Judge Bernstein pursuant to that Decision were not appealed, was Claimant's status as such a person assured. Until that time she did not know and Respondent's did not know if she was a person entitled to compensation."

Id. at 25.

Thus, the O'Leary judge held:

> "Entitled to compensation means presently recognized as entitled to compensation; it does not mean one who, after arduous years of litigation may finally be declared to be entitled to compensation. The permission of the employer and its carrier to settle a third party action must be obtained only where compensation benefits are acknowledged. Congress did not intend that permission to settle a third party action must be obtained from a Respondent who (although with apparently valid reason) denies any responsibility to make compensation benefits."

Id.

In upholding the administrative law

judge's determination, the Benefits Review Board noted that a different interpretation:

> "could result in a claimant not being paid compensation, yet the claimant would be afraid to make a third party settlement for in doing so he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . ."

7 BRBS 144, 149 (1977).

Thus, the Benefits Review Board reasoned that "the very language [of Section 933(g)] contemplat[es] that [the] employer either be making voluntary payments under the Act or that it had been found liable for benefits by a judicial determination." Id. at 148. Since the original Administrative Law Judge decision, O'Leary has remained the

seminal law concerning applicability of Section 933(g).[1]

[1] See eg. O'Leary, 5 BRBS 161 (ALJ, 1976), 7 BRBS 144 (1977), aff'd. mem. 622 F.2d 596 (9th Cir. 1980)(unpublished); Caranante v. International Terminal Operating Company, Inc., 7 BRBS 248 (1977); Wall v. Wall, 15 BRBS 197 (ALJ, 1982); Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982), aff'd. mem. 729 F.2d 757 (5th Cir. 1984)(unpublished); Todd v. J & M Welding Contractors, 16 BRBS 434 (ALJ, 1984); Wilson v. Triple A Machine Shop, 17 BRBS 471 (ALJ, 1985); Lindsay v. Bethlehem Steel Corporation, 18 BRBS 20 (1986), 22 BRBS 206 (1989); Dorsey v. Cooper Stevedoring Company, Inc., 18 BRBS 25 (1986); Nesmith v. Farrell American Station, 19 BRBS 176 (1986); Cernousek v. Braswell Shipyards, Inc., 19 BRBS 796 (ALJ, 1987); Quinn v. Washington Metropolitan Area Transit Authority, 20 BRBS 65 (1986); Lewis v. Norfolk Shipbuilding and Dry Dock Corporation, 20 BRBS 126 (1987); Evans v. Horne Brothers, Inc., 20 BRBS 226 (1988); Mobley v. Bethlehem Steel Corporation, 20 BRBS 239 (1988), aff'd. 24 BRBS 49, 920 F.2d 558 (9th Cir. 1990); Blake v. Bethlehem Steel Corporation, 21 BRBS 49 (1988); Castorina v. Lykes Brothers Steamship Company, Inc., 21 BRBS 136 (1988); Anweiler v. Avondale Shipyards, Inc., 21 BRBS 271

The Federal Circuit's interpretation of Section 933(g):

> The O'Leary decision was subsequently affirmed by the Ninth Circuit. 622 F.2d 595 (9th Cir. 1980)(unpublished, reproduced in its entirety in appendix). In affirming the decision, the Ninth Circuit held:
>
> "Here, Southeast 1) never paid compensation voluntarily or pursuant to an award and 2) disclaimed any interest in Mrs. O'Leary's third

(1988); Armand v. American Marine Corporation, 21 BRBS 305 (1988); Fisher v. Todd Shipyards Corporation, 21 BRBS 323 (1988); O'Berry v. Jacksonville Shipyards, Inc., 21 BRBS 355 (1988); Cunningham v. Kaiser Steel Corporation, 21 BRBS 154 (ALJ, 1988); Picinich v. Lockheed Shipbuilding, 22 BRBS 289 (1989); Glenn v. Todd Pacific Shipyards Corp., 22 BRBS 254 (ALJ, 1989); Sellman v. I.T.O. Corporation of Baltimore, 24 BRBS 11 (1990); Cretan v. Bethlehem Steel Corporation, 24 BRBS 35 (1990); Reaux v. H & H Welders & Fabricating, 24 BRBS 7 (ALJ, 1990).

party claim even though fully aware of the proposed settlement.

The dominant purpose of the Longshoremen's Act is to aid injured longshoremen and their dependents. Reed v. Yaka, 373 U.S. 410 (1963). The Board's ruling is reasonable and furthers the underlying purpose of the Act."

Id. at 3.

The Fifth Circuit faced the issue four years after O'Leary in Kahny v. Director, United States Dept. of Labor and Arrow Contractors of Jefferson, Inc., 15 B.R.B.S. 212, aff'd mem. 729 F.2d 757 (5th Cir. 1984)(unpublished, reproduced in its entirety in appendix). The Fifth Circuit held:

> "We find this analysis [O'Leary] fully consistent with the language, legislative history, and rationale of Section 933(g). The critical time for the determination whether one is a "person entitled to compensation" is the time of the challenged settlement. If, at that time, the employer is not making

> voluntary payments, and no award had been ordered by an ALJ, the claimant is not a "person entitled to compensation" under Section 933(g), and is not obliged to secure prior approval for a third party tort settlement."

Kahny, unpublished opinion at 7, 8.

Thus, by 1984, all the Federal Circuits who had ruled on the issue agreed with, and adopted, the O'Leary interpretation. In that year, Section 933(g) was amended. The 1984 amendments:

In 1984, Section 933(g) was amended by Congress. The 1984 amendments preserved pre-1984 Section 933(g), replete with the "persons entitled to compensation" language, and redesignated pre-1984 Section 933(g) as post-1984 Section 933(g)(1). The legislative history signifies no intent by Congress

to overrule the interpretation of Section 933(g) adopted by O'Leary and its progeny, including both the Fifth and Ninth Circuits. Congress is presumed to be aware of the administrative and judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. Lorillard v. Pons, 434 U.S. 575, 580, 98 S.Ct. 866, 870 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975); NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951).

Applying the above rule of statutory construction, the administrative law judge in Wilson v. Triple A Machine Ship, 17 BRBS 471 (ALJ, 1985) noted:

> "the key words for purposes of the O'Leary decision, supra, and the others following it are "the person entitled to compensation." . . . The 1984 amendment did not change this language. On the contrary, [Section 9]33(g) begins: "If the person entitled to compensation." . . . Thus it can be inferred that where a claimant is not being paid voluntarily or under an award he is not "a person entitled to compensation" and [Section 9]33(g)(1) does not apply."

Id. at 477.

Clearly, as Congress did not remove the "person entitled to compensation" language from Section 933(g), and the legislative history does not indicate any intent by Congress to overrule the O'Leary line of jurisprudence, the O'Leary definition of "person entitled to compensation remains viable.

Interpretation of Section 933(g)(2):

Given this, the only remaining issue before this Court, is whether the 1984 additions to Section 933(g), specifically, Section 933(g)(2), has any bearing on Petitioner's right to receive compensation. Section 933(g)(2) provides:

> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails

> to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.
>
> 33 U.S.C. 933(g)(2).

In construing this language, the Court is obliged to give effect, if possible, to every word Congress used. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); U.S. v. Menasche, 348 U.S. 528, 538-539 (1955). In this regard it is noted that Section 933(g)(2) applies "regardless of whether the employer or the employer's insurer has made payment or acknowledged entitlement to benefits under this chapter." This language,

strikingly similar to the O'Leary language defining "persons entitled to compensation", is noticeably absent from Section 933(g)(1). By adding this language to Section 933(g)(2), Congress clearly intended to preserve the interpretation of Section 933(g)(1) by the courts in O'Leary and its progeny. This serves not only to buttress the continuing viability of O'Leary, but further signifies the legislature's intent to distinguish between those claimants who are "persons entitled to compensation" and those claimants who are not "persons entitled to compensation".

O'Leary's continued viability is further buttressed by Congress' continued use of the language "persons entitled to compensation" in Section 933(g)(1) after

1984, as opposed to Congress' use of the language "employee" in Section 933(g)(2). This language evidences an intent that Section 933(g)(1) apply only to those claimants who are "persons entitled to compensation", as defined in O'Leary, and that Section 933(g)(2) apply to all claimants who are "employees", irrespective of whether said employees are also "persons entitled to compensation". It is respectfully submitted that this attempt to distinguish the two classes of claimants indicates a clear intendment to codify the O'Leary distinction. This distinction between the two classes is evident throughout the amended Section 933(g) as will be discussed infra.

It is further noted that the notice

requirements of Section 933(g)(2) are disjunctive. A claimant's right to compensation benefits is forfeited under Section 933(g)(2): (1) if no written approval of the settlement is obtained and filed as required by paragraph 933(g)(1), or (2) if the employee fails to notify the employer of any settlement obtained from or judgement rendered against a third person.

The first disjunctive portion of Section 933(g)(2) applies to those claimants who did not acquire the written approval required by Section 933(g)(1). Since under O'Leary the only claimants required to acquire written approval by Section 933(g)(1) are "persons entitled to compensation", this first disjunctive portion makes Section 933(g)(2)

applicable to those "persons entitled to compensation" who did not comply with the written approval requirements of Section 933(g)(1). As Petitioner is not a "person entitled to compensation", this first portion of the disjunctive test does not serve to bring Petitioner within the purview of Section 933(g)(2).

However, the second disjunctive portion of Section 933(g)(2) does serve to bring Petitioner under the mandate of that Section. This test is not limited to those claimants who are required to obtain written approval under Section 933(g)(1), i.e. "persons entitled to compensation". Rather, this second portion applies to all claimants who are "employees", including, but not limited to, "persons entitled to compensation".

As Petitioner was an "employee" of Nicklos, he was required to fulfill the requirements of this second portion of the Section 933(g)(2) disjunctive test.

Notably, the second disjunctive portion of Section 933(g)(2) requires the "employee" to notify the employer of any settlement, as distinguished from the requirement of written approval imposed on "persons entitled to compensation" by Section 933(g)(1),. Indeed, the first portion of the Section 933(g)(2) disjunctive test raiterates Section 933(g)(1)'s requirement of written approval for "persons entitled to compensation". Clearly, this wording indicates an intent to distinguish between the type of notice required by the various classes of claimants. While

Section 933(g)(1) claimants, i.e. "persons entitled to compensation", are required to obtain written approval, the broader class of Section 933(g)(2) claimants, i.e. "employees", are required only to notify the employer.

As the administrative law judge in Wilson, supra noted:

> "The distinction between approval and notice is highlighted by the fact that settlement and judgement are mentioned in the same phrase: "if the employee fails to notify the employee of any settlement obtained from of judgment rendered against a third person ..." Notice of judgment makes sense; approval of judgment would not. In Banks, supra, the Supreme Court expressly held that a judge's action in reducing a jury's award adequately protected the employer's interest in the adequacy of the award -- and that is the only interest the employer has in the third party action.

Wilson, supra at 478.

A statute should be interpreted so as not to render any one part inoperative. Colautti v. Franklin, 439 U.S. 379, 392 (1977), citing, Menasche, supra at 538-539. To interpret Section 933(g)(2) any other way, would be to ignore this rule of statutory construction. This is clear once it is realized that the Section 933(g)(1) claimants, i.e. "persons entitled to compensation", necessarily fall into the broader class of Section 933(g)(2) claimants, i.e. "employees". Given this, to interpret Section 933(g)(2) as requiring written notification for all claimants, would render one of the disjunctive portions of the test inoperative. If Congress had intended this statutory interpretation, i.e.

'notify' = 'obtain written approval', than the second portion of the Section 933(g)(2) disjunctive test would have sufficed to cover the situation currently described in the first portion. By making Section 933(g)(2) disjunctive, Congress clearly intended to retain the distinction enunciated by O'Leary, and to further clarify O'Leary by proscribing the slighter burden required by claimants who were not "persons entitled to compensation" under Section 933(g)(1).

In Robinson Terminal Warehouse Corporation v. Adler, 440 F.2d 1060, 1062 (4th Cir. 1971), the court held as a matter of law that where the employer of an injured longshoreman issued a draft in payment of an agreed third party tort settlement, the employer approved of the

compromise for purposes of Section 933(g). In the captioned matter, Nicklos not only knew of the settlement between Petitioner and Transco, but actually paid said settlement. Thus, Petitioner has met the notification requirement of Section 933(g)(2), the forfeiture language of Section 933(g)(2) was not triggered, and Petitioner's claim for compensation was left intact.

The above enunciated interpretation of Section 933(g)(2) has been accepted by the Benefits Review Board in Dorsey v. Cooper Stevedoring, Inc., 18 B.R.B.S 25 (1986) and Pinell v. Patterson Service, 22 B.R.B.S. 61 (1989).

In Dorsey, the Board addressed the effect of the addition of Section 933(g)(2) on claimants who were not

receiving compensation benefits at the time of the third party settlement. The Dorsey Board held that this Section clearly applies regardless of whether the employer has made any compensation benefits to the claimant. Dorsey, supra at 29, 30. The Board continued:

> "It [Section 933(g)(2)] applies if no written approval is obtained pursuant to Section 933(g)(1) or if the employee fails to notify the employer of any settlement or judgment in a third party action."

Id.

The Board in Dorsey concluded that where a claimant is not a "person entitled to compensation" he is required to either obtain written approval or notify the employer of the third party settlement.

Id.

The Board further enunciated its

position in the recent case of Pinell, supra. In Pinell, the Board held that Section 933(g)(2) does not modify the written approval requirement of Section 933(g)(1), but rather, was intended to address an entirely different situation. Pinell, supra. The Pinell Board noted:

> "Thus, under subsection [9]33(g)(1), just as under the 1972 version of Section 933(g), claimant is barred from receiving further compensation under the Act if he is a 'person entitled to compensation', i.e. employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement. Under subsection [9]33(g)(2), regardless of whether employer has made payments or acknowledged entitlement, the employer must at a minimum be given notice of a settlement or compensation and medical benefits are barred; written approval is not required."

Id.

Petitioner was not a "person

entitled to compensation" under any of these interpretations. Thus, Petitioner was required only to notify Nicklos of the settlement agreement; written approval was not required. As Nicklos paid the settlement agreement, the Section 933(g)(2) notification requirement was met. Thus, Petitioner's right to future compensation benefits was preserved.

The Director's interpretation:

Petitioner recognizes that the Board's interpretation of Section 933(g)(2) is entitled to no special deference, since the Board does not "administer" the Act. Conversely, the Director, who is charged with the administration of the Act, is entitled to such deference. Boudreaux v. American

Workover, Inc., 680 F.2d 1034, 1046 & n. 23 (5th Cir. 1982) (en banc). Thus, unless the Director's interpretation is unreasonable or contrary to the purpose of the statute, the Director's construction of the Act should be accepted. Chemical Manufacturers Association v. NRDC, 470 U.S. 116, 125-126 (1985).

In this regard, the Court's attention is drawn to the Director's brief submitted before the Fifth Circuit in the captioned matter.

> "The Director's general construction of Section [9]33(g), insofar as here relevant, accords precisely with the Board's decisions on point. Under the administrative construction, also adhered to by the Board, the written-approval requirement of Section [9]33(g)(1) was inapplicable to Cowart because of Nicklos Drilling's refusal, as of the time of the tort settlement, to

> acknowledge his right to any compensation beyond the time (over a year before the settlement) when he was released to return to work; and he satisfied Section [9]33(g)(2), which was applicable to his case, by complying with one of its two alternative requirements, that of giving notice to the employer."
>
> Director's brief, p. 13.

The Fifth Circuit's interpretation, post-1984 amendments:

> In reversing the Board's affirmance of Petitioner's compensation award, the Fifth Circuit held:
>
> "... we hold that there are no exceptions whatever to the "unqualified" language of Section 933. Rather, "the employer shall be liable for compensation...only if written approval of the settlement is obtained from the employer and the employer's carrier..." 33 U.S.C. Section 933(g)(1). In this instance "only" means "only" and, absent any room for interpretation or construction, we give it its intended meaning."
>
> 907 F.2d 1552 (5th Cir. 1990).

Petitioner agrees with this holding. However, Petitioner must respectfully disagree with the Fifth Circuit's failure to follow the express "unqualified" language which it cites. Section 933(g)(1) provides that written approval is required when the claimant is a "person entitled to compensation." Petitioner is <u>not</u> a "person entitled to compensation" under the historical, judicial interpretation of that phrase. Thus, the "unqualified" language of Section 933(g)(1) does <u>not</u> apply to Petitioner.

> The Fifth Circuit continued:
>
> "Should Congress wish to give it another [interpretation], it need only say so."
>
> <u>Id.</u>

Petitioner respectfully submits that

Congress has already enunciated its intent to limit the written approval requirement of Section 933(g)(1) by enacting Section 933(g)(2) in 1984. The interpretation and construction indicated by this enactment has been discussed in detail supra, and need not be reiterated here. Suffice it to say, that under this Court's rules of statutory interpretation and construction set out in Colautti and Menasche, the Fifth Circuit's broad-brushed interpretation of Section 933(g)(2) is insupportable.

In reaching its decision, the Fifth Circuit relied exclusively on their decision in Petroleum Helicopters v. Collier, supra. The language in Collier is indeed strong.

"Section 933(g)(1) is brutally

direct: "the employer shall be liable for compensation...only if written approval of the settlement is obtained from the employer and the employer's carrier."

Collier at 647.

By adopting this language on its face value, without taking into consideration the factual situation to which it pertained, the Fifth Circuit, circumvented the clear intent of the 1984 legislative amendments to the Act discussed supra. A brief review of the facts in Collier, bears this assertion out.

In Collier, claimant, David Collier, was injured while working as a helicopter pilot for PHI. Collier at 645. Id. Collier thereafter applied for and received benefits from PHI's insurance carrier. Id. Collier subsequently sued

Conoco in Federal District Court. Id. Collier settled his claim against Conoco on April 17, 1979. Id. This settlement was confected without the approval of PHI or its carrier, and compensation benefits were terminated for that reason on April 17, 1979. Id.

David Collier was receiving compensation benefits from his employer/carrier at the time he settled with Conoco. Evaluating this situation under the O'Leary criteria, Collier was clearly a "person entitled to compensation", and thus was clearly under the purview of Section 933(g)(1). Examined in this light, Collier's harsh wording is correct. As to "persons entitled to compensation", Section 933(g)(1) is "brutally direct." David

Collier, as a "person entitled to compensation" was entitled to benefits only if written approval of the settlement was obtained from the employer and the employer's carrier.

By contrast, the Administrative Law Judge in the case at bar, determined that Petitioner was not receiving compensation benefits at the time of his settlement with Transco, and thus was not a "person entitled to compensation" under O'Leary and its progeny. Thus, Petitioner does not fall under the purview of Section 933(g)(1). Rather, Petitioner, as an "employee", but not a "person entitled to compensation", falls under the purview of Section 933(g)(2) and therefore need only notify the employer/carrier of his settlement with the third party. As

Nicklos not only knew of the proposed settlement agreement, but actually paid it, Section 933(g)(2)'s notification requirement was clearly met, and Petitioner's right to compensation benefits was not forfeited.

The Fifth Circuit's determination is clearly at odds with the Ninth Circuit's decisions in O'Leary, (discussed supra) and Bethlehem Steel Corp. v. Mobley, 920 F.2d 558 (9th Cir. 1990). While Bethlehem Steel concerned a claimant's right to medical benefits, the decision discussed the interpretation of Section 933(g)(2).

> "Section [9]33(g)(2)'s notification requirement thus serves two purposes. First, it enables an employer to protect its right to set off the amount of a settlement against any future obligations it might have. See 33 U.S.C. 933(f).

> Second, it ensures that an employer is able to protect its right to reimbursement from the proceeds of a third-party settlement in the amount of any payment the employer has already made. . . So long as the employer has notice of the settlement before it has made any payments and before the Agency orders it to make any payments, the purposes of the statute are satisfied.

Id. at 561.

The above emphasized language in the decision enunciates the same criteria upon which O'Leary and its progeny rely, indicating that O'Leary is still good law in the Ninth Circuit. Indeed, the Ninth Circuit held:

> "a claimant's notice to an employer of a third-party settlement before the employer has made any payments and before the Agency has announced any award is sufficient under section [9]33(g)(2).

Id. at 562.

In the captioned matter, Nicklos, by paying the settlement amount to

Petitioner, certainly had notice of said settlement. It is clear that had Petitioner's claim arose in the Ninth Circuit, under Mobley, the court would have reached a different result.

The effects of the Fifth Circuit decision:

By its erroneous reliance on Collier the Fifth Circuit's decision in the captioned case sounds the death knell for literally thousands of past, pending and future claimants. The foreseeable problems caused by the Fifth Circuit's decision can arise in three distinct manners.

As to past claims, the Fifth Circuit's decision will have the effect of subjecting all claimant's who have received compensation after third party

settlement pursuant to the O'Leary line of cases to claims for reimbursement from the employer's who paid these compensation benefits. As the Fifth Circuit's decision is clearly interpretive of existing law, rather than a substantive change in law, the decision will have retrospective effect.

Thousands of claimants have settled tort actions when their employer/carrier was denying their right to compensation. Relying on the administrative construction of Section 933(g), these claimants settled without concern that they were forfeiting their rights to deficiency compensation once the amount that would have been due under the Act exceeded the net amount recovered in settlement of their tort actions. These

claims have remained on inactive status pending the exhaustion of the tort recovery. Under the Fifth Circuit's decision, employers are now seeking dismissal of these claims. The number of claims thus affected is illustrated by the fact that one Sixth Compensation District employer, Ingalls Shipbuilding, has moved to dismiss over 3,000 pending claims, pursuant to the captioned decision. If this decision is allowed to stand, these claimants will be left with no source of support, other than that available through welfare and social security. The consequential burden on the taxpayers could be staggering.

As to pending claims, the administrative law judge in Wilson, supra enunciated the problem most clearly:

> "When the employer denies compensation liability and the claimant is disabled he is likely to have no income at all. He is under great pressure to settle his third party claim as quickly as possible, even for less than it is worth. The whole purpose of [Section 9]33(g) is to prevent inadequate settlements. If any settlement, even an inadequate one, simultaneously and automatically bars the claim to compensation, the employer is encouraged to defeat the purpose of [Section 9]33(g) by withholding its approval. Such a result is a dramatic injustice. Claimant has been forced to take less than he is entitled to by his employer, which profits from its own refusal to approve the settlement by being absolved of further compensation liability."

Wilson, supra at 478, 479.

This situation can be seen in more definite terms by examining the claimant's in O'Leary, supra and Kahny, supra. Both of these claimants were widows who settled tort actions under extreme financial pressure. Both

claimants diligently sought benefits under the Act throughout their contemporaneous pursuit of third party tort recovery. However, both claimants were unable to hold out until the employers' liability could be enforced in light of the delays of the administrative delays. Both claimants settled their tort claims due only to the financial duress that these delays imposed on them.

As to future claimant's, the injustice of the Fifth Circuit's decision is most clearly seen. As an example, the case of those claimants who have sustained an occupational disease is presented. These claimants have suffered injuries as diverse as grain dust asthma, pulmonary dysfunction, and asbestosis. These cases have many similar traits,

namely:

1. The claimants know that they have contracted the disease.

2. The claimants are not currently disabled.

3. The claimants are therefore not "persons entitled to compensation."

These claimants, as a class, are often still employed in longshore work due to the relatively slow progression of their respective diseases. Given the transient nature of longshore work, these claimants do not yet know which of their numerous future employers will be ultimately responsible for their compensation benefits. However, these claimants do know that they have contracted a disease that will undoubtedly lead to their future disability. They also know the identity of the third party responsible

for said disease.

The Fifth Circuit's decision places these claimants in an untenable position. According to this decision, these claimants cannot settle their third party claims without first securing the written approval of the employer who will ultimately be responsible for their compensation benefits. As these claimants have not yet suffered a manifest disability, thus entitling them to compensation under the Act, the identity of the employer ultimately liable for their compensation benefits is as yet unknown. Meanwhile, the prescriptive period on their third party claims is currently running. The only way these claimants can hope to settle their claims before such claims are

prescribed, is by hoping that somehow their disability manifests itself within the currently running prescriptive period. If, on the other hand, their disability does not manifest itself prior to prescription, these claimants will find their third party claims prescribed.

If Section 933(g) is given the interpretation suggested by the Fifth Circuit, that statute, as applied, clearly discriminates against these occupational disease claimants. While other claimants will still be afforded the opportunity to pursue both tort and compensation remedies simultaneously (as long as they are able to financially support themselves in light of a denial of benefits by the employer/carrier), the occupational disease claimants will be

forced to either pursue a current tort remedy and forego future compensation, or alternatively, forego a current tort remedy in exchange for pursuing future compensation. Surely, given the liberal nature of the Act, such a result cannot have been anticipated by the drafters of the 1984 amendments.

Indeed, the above result was the express result sought to be eradicated by the 1959 amendments to Section 933(g). Those amendment sought to correct the problems wrought by forcing claimants to choose between tort and compensation remedies. As the legislative history notes:

> "... in exercising his right to sue a third party for damages under section [9]33 of existing law, the employee must choose whether to collect the compensation to which he

> is entitled or to pursue the third-party suit. He may not pursue both courses.
>
> Existing law works a hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party. His compensation under the act is certain but his chances of winning a third-party liability suit are uncertain. In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit. Circumstances like these are ready made for the unscrupulous who have been known to "stake" an injured employee while pursuing a damage suit - those who, in effect, purchase an injured employee's claim for their own monetary advantage."
>
> 1959 Leg. Hist. p. 2134, 2135.

It is respectfully submitted that the captioned case will serve to place occupational disease claimants in the same predicament sought to be eradicated by the 1959 amendments.

CONCLUSION

This Court is now presented with a conflict between the decisions of the Ninth Circuit and this decision of the Fifth Circuit.

Because of the far reaching consequences of this decision, and the conflict existing within the Circuits, it is submitted that the United States Supreme Court should review this decision.

Respectfully submitted,

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APPENDIX A

NICKLOS DRILLING COMPANY and
Compass Insurance Company,
Petitioners

v.

Floyd COWART and Director, Office of
Workers' Compensation Programs, U.S.
Department of Labor, Respondents.

PETROLEUM HELICOPTERS, INC.
and American Home Assurance
Company, Petitioners

v.

Mary E. BARGER and Director, Office of
Workers' Compensation Programs,
United States Department of Labor,
Respondents

Nos. 89-4944, 90-1022

United States Court of Appeals
Fifth Circuit

March 29, 1991

Appeal was taken from decision of Benefits Review Board which affirmed award of Longshore and Harbor Workers' Compensation Act (LHWCA) benefits to injured employee. In second action, employer petitioned for review of

Benefits Review Board decision affirming award of LHWCA benefits to widow of employee killed in helicopter crash. The Court of Appeals, 907 F.2d 1552, 910 F.2d 276, vacated and remanded both cases. On further review of cases, consolidated on appeal, the Court of Appeals, en banc, held that LHWCA conditions eligibility for continuing benefits on employer's and employer's insurance carrier's prior written approval of any settlement between injured employee and third person for less than employee's LHWCA compensation settlement, regardless of whether employer or employer's insurer was paying LHWCA benefits at time of settlement.

Affirmed.

Politz, Circuit Judge, filed dissenting opinion in which King and Johnson, Circuit Judges, joined.

On Petition for Review of a Decision and Order of The Benefits Review Board, U.S. Department of Labor.

Before CLARK, Chief Judge, GEE*, POLITZ, KING, JOHNSON, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER and BARKSDALE, Circuit Judges.

PER CURIAM:

Today we sit en banc to resolve a conflict in the law of our Circuit. In the cases consolidated on this appeal, two panels of our Court held that section 33 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. Section 933 (1988), conditions eligibility for continuing LHWCA benefits on the employer's and the employer's insurance carrier's prior written approval of any settlement between an injured employee and a third person for less than his

LHWCA compensation entitlement; and we further held that this approval requirement applies regardless of whether the employer or the employer's insurer was paying LHWCA benefits at the time of settlement. See also Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644,647 (5th Cir.1986). In an unpublished opinion, Kahny v. Director, Office of Workers' Compensation Programs, 729 F.2d 777 (5th Cir.1984), a panel of our Court held the contrary: that section 33's approval requirement applies only if the employer or its carrier is paying LHWCA benefits at the time of the settlement. Resolving this conflict, we now hold that the plain language of section 33 shows Congress' unambiguous intent to require prior approval whether or not the employer or its carrier was actually paying LHWCA benefits at the time of settlement. In the face of this manifest congressional intent, no administrative reinterpretation can be countenanced.

Background

In each case before us today, a person seeking LHWCA compensation for death or injury settled a related claim with a third person; and in each case, the settlement occurred at a time when the person was not receiving LHWCA benefits, was for less than the employee's compensation entitlement, and was consummated without the approval of the employer or his carrier. In Nicklos Drilling Co. v. Cowart, 907 F.2d 1552 (5th Cir.1990), Floyd Cowart, an employee of Nicklos Drilling Company, sought LHWCA compensation for injuries he had received on Nicklos' drilling rig. At a time when

Mr. Cowart was not receiving LHWCA benefits from Nicklos or its insurance carrier, he settled his claim against Transco Exploration Company, which owned the offshore platform that supported Nicklos' rig. In Petroleum Helicopters, Inc. v. Barger, 910 F.2d 276 (5th Cir.1990), Mary Barger, the widow of Walter Barger, sought LHWCA compensation for her husband's death. Mr. Barger died when the helicopter that he was piloting crashed. The helicopter was owned by his employer, Petroleum Helicopters, Inc. (PHI), and manufactured by Bell Helicopter Textron. Ms. Barger settled her claim against Bell at a time when she was not receiving LHWCA benefits from either PHI or its insurance carrier. The panel opinions contain more detailed accounts of the facts.

Review of an Administrative Interpretation

Generally, the question before us is whether section 33 of the LHWCA permits any exception to its requirement that all settlements with third persons that leave the employer liable for further compensation benefits have the prior written approval of the employer and the employer's insurance carrier. Specifically, the Office of Workers' Compensation Programs (OWCP) urges us to accept its in-house administrative interpretation that section 33 requires prior written approval only if the employer or its carrier is actually paying LHWCA benefits at the time of settlement. In Kahny we accepted OWCP's administrative interpretation, but in Collier, Nicklos Drilling, and Burger we rejected this

interpretation.

In support of its position, the OWCP points out that section 33's purpose is to allow a person entitled to LHWCA benefits to receive those benefits and still pursue civil remedies against third persons. According to the OWCP, the predecessor to section 33 required an election of remedies and often caused severe financial hardship to individuals who chose to pursue civil action and forego LHWCA benefits. OWCP argues that to alleviate this hardship Congress expressly eliminated election of remedies by enacting section 33 (a). Extending this argument, OWCP maintains that financial hardship can be avoided only by paying benefits during the pendency of a civil action; thus, settlements require prior written approval only if the employer or its carrier is actually paying benefits. The actual payment of benefits, according to OWCP, is the price which Congress intended employers to pay for the right of prior approval.

Second, OWCP maintains that section 33(g)(2) can be given complete meaning only if we accept OWCP's administrative interpretation. For convenience, we set out the relevant portions of section 33 here:

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employee is liable in damages, he need not elect whether to receive such compensation or

to recover damages against such third person.

(g) Compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer nd the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative).

The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. Section 933(1988). OWCP argues that the language following the disjunctive "or" in section 33(g)(2)

would be rendered partially meaningless if prior written approval of all settlements were always required, because the alternative of merely notifying the employer of such a settlement would have no function.

We begin our consideration of OWCP's position by noting the Supreme Court's guidance in cases involving administrative interpretations.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed. 2d 694 (1984) (footnotes omitted).

More recent, and more closely in factual point, is the Court's decision in Demarest v. Manspeaker, --U.S.--, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991), where

the Court unanimously declined to give effect to a "longstanding administrative construction" in the face of clear statutory language granting witness fees to incarcerated state prisoners who testify in federal court proceedings.

The Court of Appeals, while agreeing that the statutory analysis outlined above was "(o)n its face...an appealing argument," 884 F.2d (1343) at 1345 (10th Cir.1989), relied on longstanding administrative construction of the statute denying attendance fees to prisoners, and two Court of Appeals decisions to the same effect, followed by congressional revision of the statute in 1984.

But administrative interpretation of a statute contrary to language as plain as we find her is not entitled to deference. See Public Employees Retirement System of Ohio v. Betts, 492 U.S.158 [109 S.Ct. 2854, 10 L.Ed.2d 134] (1989). There is no indication that Congress was aware of the administrative construction, or of the appellate decision at the time it revised the statute. Where the law is plain, subsequent re-enactment does not constitute an adoption of a previous administrative construction. Leary v. United States, 395 U.S. 6,24-25 [89 S.Ct. 1532, 1541-42, 23 L.Ed.2d 57] (1969).

When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances.... We cannot say that the payment of witness fees to prisoners is sc bizarre that Congress "could not have intended" it. [Quoting Griffin v. Oceanic Contractors, Inc., 458 U.S.564,

575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973 (1982)].
--U.S. at --, 111 S.Ct. at 603-04 (footnote omitted).

As Collier, Nicklos Drilling, and Barger-our three most recent and only published opinions-demonstrate, we believe that the words of section 33 are unambiguous and therefore foreclose OWCP's contrary administrative interpretation. Yet, OWCP has raised two arguments that, if true, would introduce ambiguity concerning the congressional intent underlying section 33.

Turning to OWCP's first argument, we are unpersuaded that congressional desire to eliminate the financial hardship attendant on election of remedies necessitates an exception to section 33's approval requirement. First, the language of section 33 provides no exception to its approval requirement. Second, section 33(g)(2) does expressly provide that LHWCA benefits "shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter". 33 U.S.C. Section 933 (g)(2) (1988) (emphasis added). This language squarely refutes OWCP's contention that Congress intended the actual payment of benefits to be a tradeoff for the right of prior approval. Third, OWCP's reading of section 33 is not necessary to prevent financial hardship to persons pursuing civil remedies. Section 33(a) expressly provides that persons entitled to LHWCA benefits need not make an election of remedies; rather, they may receive the

LHWCA benefits while simultaneously pursuing the civil remedy. To the extent that LHWCA claimants may choose to ignore their rights and responsibilities under section 33, Congress did not and cannot have intended to guard against such self-inflicted hardship.

We are also unpersuaded that OWCP's administrative interpretation is necessary to give meaning to the phrase "or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person." 33 U.S.C. Section 933(g)(2)(1988). While superficially persuasive, OWCP's argument does not stand careful scrutiny. First, the quoted phrase is necessary because it extends the notification requirement to judgments. Second, the quoted phrase requires that the claimant notify the employer of _any_ settlement or judgment whatever. As we note above, prior written approval is required only if, as Section 33(g)(1) provides, the amount of the settlement is "less than the compensation to which the [claimant] would be entitled under this chapter." Congress intended to require prior written approval in the limited circumstance where a claimant settles for an amount smaller than his LHWCA compensation entitlement. By contrast, only notification is required when a claimant receives a judgment or settles for an amount exceeding his LHWCA compensation entitlement. Congress's schemes of approval and notification dovetail perfectly; there is no ambiguity.

Conclusion

After carefully considering the permissibility of OWCP's administrative interpretation in light of the plain language of section 33, we conclude that Congress has spoken unambiguously and so as to leave no room for such embroidery. We therefore hold, in accord with the clear terms of the statute, that section 33's prior written approval requirement applies regardless of whether the employer or its carrier is paying LHWCA benefits at the time of settlement. By Chevron, there it ends. Accordingly, we AFFIRM our decision in Nicklos Drilling, AFFIRM our decision in Barger, and OVERRULE our earlier, unpublished decision in Kahny. POLITZ, Circuit Judge, with whom KING and JOHNSON, Circuit Judges, join, dissenting.

I respectfully dissent. In 1984, as a member of an oral argument panel I authored the unpublished opinion in Kahny v. Arrow Contractors, 759 F.2d 777 (5th Cir.1984), (aff'd mem), in which we accepted the interpretation of the Director of the Office of Workers Compensation Programs, that the phrase "person entitled to compensation" as used in 33 U.S.C. Section 933(g) meant a person either receiving compensation benefits or the beneficiary of an ALJ award. I then considered such to be a proper interpretation of that statutory phrase; I am of the same opinion still.

The Director of the OWCP has so interpreted the phrase in an untold number of cases. In his briefs the Director has detailed the reasoning behind the interpretation, including the statutory

and legislative history of the parent legislation pertinent to the phrase. The Director advises that his conclusion is based not only upon that statutory and legislative history, but is informed by years of practical experience in administering the Longshore and Harbor Workers Act in many thousands of cases.

The majority rejects the Director's interpretation out of hand. I am not disposed to do so. Deference must be more than lip service. Deference presupposes deferring when one disagrees, otherwise there is no deference.

In this circuit we have recognized, both en banc and in panels, that the construction placed on the Act by the Director is to be given the deference we are constrained to give an administrative agency. See, e.g., Boudreaux v. American Workover, 680 F.2d 1034, 1046 n. 23 (5th Cir.1982) (en banc); Alford v. American Bridge, 642 F.2d 807, 809 n. 2 (5th Cir. 1981).

I view the Director's construction of the subject phrase to be a reasonable one, given the statutory and legislative history of the Act. Early on a person injured on the job had to elect either to proceed under the Act or to seek recovery in tort. Congress deemed this too harsh and eliminated the election requirement. In its place it placed the consent and, later, notice requirements in the Act. Both have a place in a comprehensive scheme which I perceive as just to all concerned. One need not elect but simultaneously may proceed in comp against the employer, while proceeding in tort against a responsible third party.

If one does the latter and is receiving comp benefits from the former one must secure the employer's consent to settle if one is to preserve the right to receive comp payments in excess of the tort settlement. That is totally appropriate and fair because the employer is entitled to a credit for the sums recovered in tort in the instance of a job-related injury caused by a tortiously acting third person. But the requirement is not absolute.

Assume a not infrequent occurrence. The employer denies owing compensation and refuses to pay. The employee seeks tort recovery from a third party. A settlement is offered. Why must the employee, who was denied comp, go hat in hand to the employer and request permission to settle his claim? Why should he? This query is not simply erecting a straw man. In one of the consolidated cases, Barger, we find the anomaly of the employer defensing a Jones Act claim by Barger's survivor by formally judicially claiming that it owed only LHWCA comp payments for Barger's accidental death, and then defensing the subsequent comp claim by insisting that the survivor had forfeited her comp claim because she did not get the employer's approval to settle the tort claim against a third-party tort feasor.

I agree with the Director's long-standing construction that it is not reasonable to require an employee to secure the approval of the employer before making a tort settlement if the employer has declined to pay comp benefits. I can conceive of no valid

purpose to be served by requiring otherwise other than to serve as the basis for forfeiture of a legitimate comp claim by an injured worker or the survivors of a deceased worker. The parties argue that the statute was amended to overrule the Director's erroneous interpretation. If that were so one would expect some small reference to such in the legislative history. There is none. There is no acceptable explanation offered for the absence of such.

In 1984 the provision containing the phrase at issue was reenacted without change. Surely that ought to be some indication that the universal construction given the phrase by the Director, multiple ALJs, the Benefits Review Board, and several courts has received congressional approval. I am so persuaded.

Finally, the provision for notice added in 1984, section 933(g)(2) adds to the force of the Director's construction. The Act first provides for approval of the employer if comp is being paid. In the notice provision the Act goes on to require notification of a settlement or judgment, whether comp is being paid or not. To me this latter is to alert the employer and comp carrier of the existence of an offset against any comp entitlement. It is a reasonable requirement to prevent double recovery. Nothing more.

I am convinced that the Director's interpretation in this instance is reasonable and I therefore respectfully dissent.

APPENDIX B

NICKLOS DRILLING COMPANY and
Compass Insurance Company
Petitioners

v.

Floyd COWART and Director, Office of
Workers' Compensation Programs, U.S.
Department of Labor, Respondents.

No. 89-4944
summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Aug. 9, 1990.

Injured worker sought additional Longshore and Harbor Workers' Compensation Act (LHWCA) benefits. The Benefits Review Board affirmed the administrative law judge's award in favor of the employee, and appeal was taken. The Court of Appeals held that future LHWCA benefits must be denied employee who fails to obtain prior consent by employer/carrier to settlement of his

claim against third-party tort-feasor.

Vacated and remanded.

Petition for Review of a Decision and Order of The Benefits Review Board, U.S. Department of Labor.

Before GEE, DAVIS, and JONES, Circuit Judges.

PER CURIAM:

Today we reverse a decision of the Benefits Review Board as contrary to the unambiguous language of the Longshore and Harbor Workers' Compensation Act (LHWCA) and to what we had thought was the clear mandate of this Court. Because the Benefits Review Board (BRB) has refused to heed Congress's and our earlier beyond peradventure. We have in the past consistently held, and we now reaffirm, that future LHWCA benefits must be denied an employee who fails to obtain prior consent by his employer/carrier to the settlement of his claim against a third party tortfeasor. There are no exceptions to this rule: Congress enacted none, we engraft none, and we will tolerate the engraftment of none by the BRB in cases within our appellate jurisdiction.

FACTS and PRIOR PROCEEDINGS

Floyd Cowart was injured on July 20, 1983, on a Nicklos Drilling Company drilling right. The right was on a fixed offshore platform being operated by Transco Exploration Company. Mr. Cowart made a claim against NIcklos and its carrier for benefits under the LHWCA and filed suit against TRansco in Federal District Court, seeking compensation for his injury. The carrier paid Cowart benefits for temporary total disability

until May 21, 1984, when he was released to return to work. On July 1, 1985, without the written approval of Nicklos or its carrier, Cowart settled his third party claim against Ransco for a lump sum payment of $45,000.00

Thereafter, Cowart filed this claim against Nicklos and its carrier seeking additional LHWCA compensation. Nicklos and the carrier resisted, arguing that Cowart's failure to obtain their written approval to the settlement barred his recovery of additional LHWCA benefits. a The ALJ ruled in favor of Cowart, awarding him the difference between the amount prescribed by the Act for permanent partial disability and the amount of the settlement. The Benefits Review Board affirmed. We reverse.

Discussion

The relevant section of the Longshore and Harbor Workers' Compensation Act provides as follows:

§ 933. Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

* * * * * * * *

(g) compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's

representative) enters into a settlement with a third person referred to in subsection (a) this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) this section only if written approval the settlement is obtained from employer and the employer's carrier before the settlement is executed, a by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer andy settlement obtained from or judgment rendered against a third person all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether employer or the employer's insurer made payments or acknowledged entitlement to benefits under this circuit.

33 U.S.C. § 933 (emphasis added).

The underlined portion of the above-quoted statute requires, in set terms and with qualification, exception or limitation, the person entitled to compensation obtain written approval both from his employer and from the employer's insurance carrier before entering into a settlement with a third person. A

failure to comply with this requirement results in the forfeiture of their benefits under the LHWCA, in all cases.

We have faced this issue in the past, and we are convinced that we resolved it properly. In Petroleum-Helicopters, Inc. v. Collier we made clear that § 933's requirement that an employee and carrier for any settlement with a third party tortfeasor is "unqualified", and we declined to read into it a "waiver of subrogation" exception. Petroleum Helicopters, Inc. v. Collier, 784, F.2d 644, 647 (5th Cir. 1986).

so that the BRB can be guided in its future decisions, and because we do not wish to again revisit the issue, we hold that there are no exceptions whatever to the "unqualified" language of § 933. Rather, "the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier ..." 33 U.S.C. § 933(g)(1) (emphasis added). In this instance "only" means "only" and, absent any room for interpretation or construction, we give it its intended meaning. Should Congress wish to give it another, it need only say so.

According, the Decision and Order of the Benefits Review Board is VACATED and this matter is REMANDED to the Administrative Law Judge for the entry of an order consistent with this opinion.

APPENDIX C

BRB No. 87-330

FLOYD COWART Claimant-Respondent	)
v.	)
NICKLOS DRILLING COMPANY	)
and	)
COMPASS INSURANCE COMPANY Employer/Carrier Petitioners	)

DECISION AND ORDER

Appeal of the Decision and Order, the Order on Petition for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees of Parlen L. McKenna, Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz (Seelig, Cosse, Frischhertz and Poulliard), New Orleans, Louisiana, for Claimant.

H. Lee Lewis, Jr. (Ross, Griggs & Harrison), Houston, Texas, for employer/carrier

Before: SMITH, Acting Chief Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and

Order, the Order on Petition for Reconsideration and the Supplemental Decision and Order Awarding Attorney's Fees (85-LHC-2125) of Administrative Law Judge Parlen L. McKenna rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. Section 901, et seq., as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. Section 1331, et seq., (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are supported by substantial evidence, are rational and are in accordance with law. 33 U.S.C. Section 921(b)(3); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant was injured in the course of his employment on July 20, 1983, while working on a fixed platform operated by Transco Exploration Company. Claimant suffered injuries to his right hand and lost the distal half of his right thumb as a result of this incident. Claimant was off work from July 21, 1983 to May 21, 1984, when he was released to return to work with employer with a 40 percent permanent partial disability based on the loss of use of his right hand and thumb. Employer paid claimant temporary total disability benefits during this period. 33 U.S.C. Section 908(b). However it refused to pay claimant permanent partial disability benefits upon his return to work. Claimant filed a civil suit in the United States District Court for the Eastern District of Louisiana, alleging that Transco, the third party and owner

of the platform, was responsible for his injuries. Prior to trial, a settlement was reached between Transco and claimant on July 1, 1985 in which Transco agreed to pay claimant a lump sum of $45,000. Employer did not give its written approval of this settlement, but it did have notice of the settlement. Claimant subsequently filed this claim under the Act for a schedule award of permanent partial disability benefits based on the injuries to his right hand and thumb. Employer contended below that because it did not give written approval to claimant prior to the third party settlement, claimant is barred under Section 33(g), 33 U.S.C. Section 933(g), from receiving any future compensation.

The administrative law judge found that Section 33(g) did not bar claimant's right to compensation under the Act. The administrative law judge noted that in Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir.1986), rev'g 17 BRBS (1985), the United States Court of Appeals for the Fifth Circuit held that the failure by an injured employee to obtain employer's prior consent to settlement of the employee's claim against a third party tortfeasor bars the employee's right to future benefits under the Act, including situations where the employer has contractually waived its subrogation rights against the third party tortfeasor. The administrative law judge stated, however, that the court in Collier made no decision regarding what would occur where benefits were not being voluntarily paid by employer at the time of settlement,

i.e., where one is not a "person entitled to compensation" under the Act. The administrative law judge noted that in O'Leary v. Southeast Stevedoring Co., 18 BRBS 25 (1986), the Board indicated that it is only in situations where employer is paying compensation either voluntarily or pursuant to an award that claimant is are required to obtain prior written consent for its third party settlement. The administrative law judge concluded that since in the instant case claimant was not receiving compensation from employer at the time of settlement he was not a person entitled to compensation under Section 33(g)(1) of the amended Act and that employer's prior written approval was not required. 33 U.S.C. 933(g)(1)(Supp. V 1987). The administrative law judge further found that Section 33(g)(2), 33 U.S.C. Section 933(g)(2) (Supp.V 1987) did not bar the claim, as employer had notice of the settlement before it was effected. The administrative law judge therefore ordered employer to pay claimant permanent partial disability benefits of $6,242.17, or the difference between the amount of his past due compensation, $35,592.77, and his net recovery from the third party settlement, $29,350.60. 33 U.S.C. Section 907, ordered employer to pay claimant interest in accordance with 28 U.S.C. Section 1961 on all past due benefits, and authorized claimant's counsel to submit a petition for an attorney's fee.

Following the issuance of the administrative law judge's Decision and Order, employer submitted a Motion for

Recusal and Petition for Reconsideration of the administrative law judge's Decision and Order. (1) Regarding the petition for reconsideration, the administrative law judge reiterated his finding in his original Decision and Order, i.e., that since claimant was not a "person entitled to compensation", Section 33(g)(1) does not bar his right to compensation under the Act. Moreover, the administrative law judge rejected employer's contention that he raised the issue of claimant's entitlement to future medical benefits sua sponte, thus causing prejudice to employer and violating its procedural due process rights, concluding that he had properly addressed the issue of future medical benefits. Lastly, the administrative law judge reaffirmed his findings granting interest and claimant's entitlement to an attorney's fee award. Claimant's counsel subsequently was awarded an attorney's fee of $4,125.74.

On appeal, employer contests the administrative law judge's findings with regard to Section 33(g), medical benefits, interest, and attorney's fees. Claimant responds, urging affirmance.

I. Section 33(g)

Employer contends that the administrative law judge's finding that Section 33(g) does not bar claimant's right to future compensation runs contrary to the Fifth Circuit's holding in Collier, supra. Employer challenges the administrative law judge's reliance on the fact that claimant was not a "person entitled to compensation", i.e., receiving voluntary payments at the time of

settlement. Employer ccntends that the Fifth Circuit in Collier imposed an absolute requirement for written approval of third party settlements, and did not mention anything pertaining to a "person entitled to compensation". Employer further asserts that Collier involved a situation, like that in the instant case, where the two employers had a contract containing an agreement to waive subrogation and to indemnify the potential third party tortfeasor. Finally, employer contends, the Fifth Circuit in Collier reviewed the changes made by the 1984 Amendments to Section 33(g) and concluded that the Act allows no exceptions to the written approval requirement.

We reject employer's contentions, as we agree with the administrative law judge that Collier may be distinguished from the instant case. In Collier, the claimant was receiving voluntary payments of compensation from the employer for injuries sustained in a work-related accident. Claimant sued a third party tortfeasor in Federal District Court, but settled this suit without the approval of the employer or its carrier. The employer subsequently terminated its compensation payments. Claimant sought to have his disability benefits resumed, and the employer countered that claimant's failure to obtain its consent to the settlement eliminated its compensation liability. The administrative law judge rejected this contention, and the Board affirmed, agreeing with claimant that the employer's approval of the settlement was unnecessary as the employer had contractually waived all rights of subro-

gation against the third party. The Board also stated that Section 33(g) does not apply in cases where the employer waives its subrogation rights against a third party. Collier v. Petroleum Helicopters, Inc., 17 BRBS 80 (1985).

The employer appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit, which reversed the Board's decision. Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir. 1936). The court framed the narrow issue before it as follows:

(D)oes the failure of an injured employee to obtain the prior consent of the employer/carrier to settlement of the employee's claim against a third party tortfeasor bar the employee's right to future benefits under the LHWCA when the employer/carrier has contractually waived their subrogation rights against the third party tortfeasor?

Collier, 784 F.2d at 645, 18 BRBS at 68 (CRT). The court held that although one of the employer's interests in the settlement, that of recoupment of compensation benefits from the settlement proceeds, was absent under these circumstances, the employer retained an interest in the amount of its statutory offset under Section 33(f), 33 U.S.C. Section 933(f); therefore, claimant's failure to obtain the employer's prior written consent under Section 33(g) barred claimant's right to further compensation. Id., 784 F.2d at 646-647, 18 BRBS at 71 (CRT). See also Pinell v. Patterson Service, 22 BRBS 61 (1989).

As the administrative law judge

found, the instant case is not factually similar to Collier, and the legal issues are not the same. Although, as in Collier, employer and Transco had a waiver of subrogation agreement in this case, no one contends that fact renders Section 33(g) inapplicable. As the subrogation agreement, and that issue is not present here. Moreover, in Collier, employer voluntarily paid benefits at the time of the third party settlement. Thus, there was no dispute that Section 33(g) in 1984 with the addition of Section 33(g)(1) applied unless the waiver of subrogation agreement rendered it inapplicable. The changes made in Section 33(g) in 1984 with the addition of Section 33(g)(2) and their effects on claimants who were not paid benefits voluntarily or pursuant to an award were not before the court. (2)

Prior to the 1984 Amendments, the Board held that a claimant was a "person entitled to compensation" within the meaning of Section 33(g), 33 U.S.C. Section 933(g)(1982) (amended 1984), if employer was paying benefits either voluntarily or pursuant to an award at the time of the third party settlement. See O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977), aff'd mem., 622 F.2d 595 (9th Cir. 1980). If claimant was not receiving benefits, Section 33(g) did not apply. See Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982), aff'd mem., 729 F.2d 777 (5th Cir. 1984). At that time, Congress added Section 33(g)(2), which provides:

> (2) If no written approval of the settlement is obtained and filed as

> required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

33 U.S.C. Section 933 (g)(2)(Supp. V 1987). In Dorsey v. Cooper Stevedoring Co., Inc., 18 BRBS 25 (1986), the Board addressed the effect of the addition of Section 33(g)(2) on claimants who were not receiving any benefits at the time of a third party settlement. This section clearly applies regardless of whether employer has made any payments to claimant. However, it applies if no written approval is obtained as discussed in subsection (g)(1) or if the employee fails to notify the employer of any settlement or judgment in a third party action. In Dorsey, in order to give effect to all parts of the statute, the Board concluded that where claimant is not a "person entitled to compensation," he is required to either obtain written approval or notify employer of the third party settlement. See also Chavez v. Todd Shipyards Corp., 21 BRBS 272 (1988); Mobley v. Bethlehem Steel Corp., 20 BRBS 239 (1988). This construction of the statute protects employer's Section 33(f) lien interest by requiring that claimant, at a minimum, provide employer with notice of any settlement or judgment. See Mobley, supra.

As employer contends, the court's opinion in Collier contains language to the effect that there is no exception to the written approval requirement of Section 33(g)(1). The court in Collier, however, did not address the case where claimant is not a "person entitled to compensation" or the notice provision of Section 33(g)(2). Under these circumstances, the administrative law judge found that employer had notice of the settlement at least three months before it was consummated. Accordingly, as the administrative law judge's finding that Section 33(g) does not bar claimant's entitlement to benefits is rational, supported by substantial evidence and is in accordance with law, we affirm his finding.

II. Interest

Employer contends that the administrative law judge's award of interest on past due compensation payments runs contrary to 28 U.S.C. Section 1961, which it claims only allows interest to be paid on money judgments in civil cases in District Court. We reject this contention. While there is no provision in the Act providing for payment of interest on unpaid installments of compensation, the Board has held that interest awards are consistent with the congressional purpose of making claimants whole for their injuries. Santos v. General Dynamics Corp., 22 BRBS 226 (1989); Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984), modified on reconsideration, 17 BRBS 20 (1985). The Board relied on Section 1961 in Grant as guidance in

establishing an appropriate rate of interest. We therefore reject employer's contention that Section 1961 is not applicable to administrative tribunals, and we affirm the administrative law judge's award of interest on past due compensation.

III. Medical Benefits

Employer contends that the administrative law judge's award of future medical benefits was not based on the evidence contained in the record, and was raised sua sponte by the administrative law judge. Employer contends that it had insufficient opportunity to respond to the administrative law judge's order of May 14, 1986, in which he found that the issue of future medical benefits should be included for consideration in the instant case, and that claimant submitted his brief without providing a copy of a certificate of service to employer.

We reject employer's argument. As the administrative law judge noted in his order on Petition for Reconsideration, he is permitted pursuant to 20 C.F.R. Section 702.336(a) (3) to include new evidence or issues not raised in the parties' pleadings, provided the parties are provided with fair notice. See Cornell University v. Velez, 856 F.2d 402, 21 BRBS 155 (CRT) (1st Cir. 1988). The administrative law judge noted in his Order on Petition for Reconsideration that claimant had initially raised the issue of his entitlement to future medical benefits at the hearing and had expressed his concern that such benefits might not be forthcoming. The

administrative law judge then issued an order in which he stated that although no discussion regarding the issue of future medical benefits was held at the hearing, and was not raised in the pleadings, he would consider the issue in view of claimant's "strong feelings" on the subject. (4) Order at 3-4. The administrative law judge then directed the parties to submit briefs addressing this issue within 30 days, and gave employer ten days to submit additional evidence in opposition to the grant of future medical benefits and to indicate whether it wanted an additional oral evidentiary hearing regarding the matter. As employer had an opportunity to address the issues, availed itself of this opportunity and submitted a brief, its due process rights were not violated.

Further, and administrative law judge can award future medical benefits for a work-related injury, but the services ultimately provided must be reasonable and necessary for the work-related injury. 33 U.S.C. Section 907; see generally Winston v. Ingalls Shipbuilding Inc., 16 BRBS 1007, rev'd on other grounds, 682 F.2d 968 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146 (1982). At such time when claimant applies for future medical expenses, employer may object to such treatment as the issue arises. We therefore affirm the administrative law judge's award of future medical benefits.

IV. Attorney's Fee

Employer lastly contends that the administrative law judge erred in awarding claimant's counsel an attorney's

fee because it did not receive a copy of the fee petition. Employer also raises specific objections to itemizations in the fee petition. The administrative law judge awarded claimant's counsel an attorney's fee of $4,125.74 in his Supplemental Decision and Order Awarding Attorney's Fees. Employer objected to this award, however, alleging that it never received a copy of claimant's fee petition and was therefore unable to contest the award. The administrative law judge thereafter issued an Order Staying Attorney's Fees, in which he allowed employer an opportunity to review claimant's fee petition and to make objections. However, the administrative law judge has not issued his final decision on the award of an attorney's fee and employer raises specific objections to the award before the Board.

Accordingly, the Decision and Order and the Order on Petition for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

Dated this 31st
day of October 1989

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(1) The administrative law judge denied employer's motion for recusal finding that it was without merit. Employer does not contest the administrative law judge's denial of its motion.

(2) The amended version of Section 33(g) applies to this case as it was filed after or pending on September 28, 1984, the effective date of the Longshore and Harbor Workers' Compensation Act Amendments of 1984. 1984 Amendments,

Pub. L. No. 98-426, 98 Stat. 1639, 1655, Section 28(a).

(3) Section 702.336(a), 20 C.F.R. Section 702.336(a) states:

If, during the course of the formal hearing the evidence presented warrants consideration of an issue or issues not previously considered the hearing may be expanded to include the new issue. If in the opinion of the administrative law judge the new issue requires additional time for preparation, the parties shall be given a reasonable time within which to prepare for it.

(4) The administrative law judge also noted that a conference call was held in which he informed the parties that he would subsequently issue and order regarding the matter.

APPENDIX D

In the Matter of

FLOYD COWART, Claimant	)	Case No. 85-LHC-2125
versus	)	OWCP No. 8-77392
NICKLOS DRILLING COMPANY, Employer	)	
COMPASS INSURANCE COMPANY, Carrier	)	

Doulgas M. Moragas,
Esquire For the Claimant

H. Lee Lewis, Jr.,
Esquire For the Employer/Carrier

Before: PARLEN L. McKENNA
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. (The Act), and the governing regulations thereunder, as extended to cover certain employees under the Outer

Continental Shelf Lands Act, 675 Stat. 462, 43 U.S.C. 1331 et seq. The claim was filed by Floyd Cowart, Claimant, against Nicklos Drilling Company, Employer, and Compass Insurance Company, Carrier. On July 18, 1985, this matter was referred for a formal hearing to the Office of Administrative Law Judges. The hearing was held in New Orleans, Louisiana, on April 29, 1986. Claimant's exhibits numbered 1 through 6 and Joint exhibit number 1 were admitted into evidence without objection.

During the hearing in this matter, questions were raised as to whether the Fifth Circuit's decision in Petroleum Helicopter, Inc., et al v. Collier, No. 85-4321 (March 10, 1986), barred the Claimant's cause of action under Section 33(g) of the Act. The Employer's counsel took the position that since the Claimant had settled his third-party suit without the written consent of the Employer, a claim for compensation benefits is barred under the Longshore Harbor Workers' Compensation Act.

33 U.S.C. 901 et seq. Claimant's counsel indicated that absent a bar because of the third-party settlement, Mr. Cowart would have been entitled to $35,392.77 as a scheduled injury. Mr. Cowart's gross third party recover while amounting to $45,000.00 only netted him $29,350.60, after the deduction of attorney's fees and expenses. Thus, absent a bar, Mr. Cowart would have been entitled to $6,242.17 plus future medical benefits if he prevailed in this case. Since neither party had anything further to present, the hearing was adjourned.

Issues

On May 14, 1986, the undersigned issued an Order directing the parties to submit briefs addressing the following issues within 30 days from the date of issuance of the Order:

(1) Whether the Claimant waived his right to permanent partial disability benefits under Section 8(c)(6) of the Act and to future medical benefits by settling a related third-party lawsuit without his employer's written consent; and

(2) Whether the Fifth Circuit's decision in Petroleum Helicopter, Inc., et al v. Collier, No. 85-4321 (March 10, 1986), overruled the Benefit Review Board's decisions in Dorsey v. Cooper Stevedoring Co., Inc., 18 BRBS 25 (1986), and O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977), aff'd mem., 611 F.2d 595 (9th Cir. 1980).

Consequently, these unresolved issues will be addressed in this Decision and Order.

Stipulations

At the outset of the hearing, the parties stipulated, and I so find:

1. That the parties are subject to the Act;

2. That Claimant and Employer were in an employee/employer relationship at the time of the injury;

3. That Claimant was injured on July 20, 1983.

4. That Claimant was in the course and scope of his employment;

5. That Claimant gave timely notice of the injury to Employer;

6. That Claimant filed a timely

claim for compensation;

7. That Employer filed a timely notice of controversion of the claim;

8. That compensation benefits were paid to Claimant for temporary total disability from July 21, 1983 to May 30, 1984, at a rate of $364.68 per week for a total of $16,775.28 to date of hearing;

9. That Claimant's average weekly wage was $547.00;

10. That Claimant is now permanently partially disabled (40% to his hand);

11. That all medical benefits have been paid; and,

12. That at the time of the injury there was in effect a Platform Drilling Contract which provided for an agreement to hold harmless, waiver of subrogation and indemnification between the parties and those provisions were adhered to by the parties.

Facts

Claimant, a motorman, was employed by Nicklos Drilling Company, and at the time of the accident, was working on a fixed platform owned and Transco Exploration Company (Transco). On July 20, 1983, Claimant was laboring on Rig #81, located on the Outer Continental Shelf, when he sustained injuries to his right hand, when a mud tank crushed his hand during movement of the tank by a crane. Claimant also lost the distal half of his thumb as a result of the accident. Following his injury, Claimant was treated by a series of physicians, including Frank X. Cline, Jr., M.D., an orthopaedic surgeon of Monroe, Louisiana. Claimant reached maximum medical improvement on May 21, 1984. At that

time, Dr. Cline released Claimant to return to employment and assessed a 40% permanent partial disability based on the loss of the distal half of his thumb and residual synovitis in the flexor tendons.

Employer and its Carrier paid Claimant temporary total disability from July 21, 1983 through May 21, 1984, at the rate of $346.68 per week for a total of $16,775.28. Since Claimant had a scheduled injury under Section 8(c)(6) of the Act, once he reached maximum medical improvement he was automatically entitled to 66 2/3 of his average weekly wage of $542.00 for a period of 75 weeks commencing May 22, 1984. The Department of Labor recommended Employer/Carrier to pay Claimant compensation based on his permanent partial disability rating. The record indicates that Employer/Carrier never made such payments. Finally, on April 22, 1985, the Deputy Commissioner corresponded to the Carrier noting that compensation in the amount of $35,592.77 plus 10% penalties and interest was due to the Claimant. Claimant filed suit in the United States District Court for the Eastern District of the Louisiana against Transco, the third party and owner of the rig, for its negligence in causing the accident. On July 1, 1985, Claimant confected a settlement with Transco for $45,000.00 of which he netted $29,350.60 after the deduction of attorney's fees and expenses. Employer/Carrier did not give written approval of the settlement but had notice of the settlement, as is indicated by the record.

The findings of fact and conclusions of law which follow are prepared upon my

analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law.

Findings of Fact and Conclusions of Law

The threshold question to be resolved is whether Section 33(g) bars the Claimant's entitlement to (1) permanent partial disability and (2) future medical benefits. Fundamental to the first question is whether the Fifth Circuit's decision in Collier, supra, overruled the Benefits Review Board decision in the Dorsey and O'Leary, supra. Claimant argues that Section 33(g) does not bar his recovery to compensation and future medical benefits pursuant to the Board's decisions in Dorsey and O'Leary, supra. Claimant argues that he is only required to obtain written approval from the Employer if he is receiving compensation. Since he was entitled to receive compensation for his scheduled injury after reaching maximum medical improvement, but the Employer withheld such compensation, he had no obligation to give written notice of the settlement to the Employer, relying on Dorsey's Section 33(g)(2) exception to the written notice requirement. (Also, see O'Leary, supra).

On the other hand, the Employer/Carrier contend that since Claimant did not secure written approval of the third party settlement pursuant to Section 33(g) of the Act, he is barred from entitlement to $6,242.17, the difference between his net recovery and the outstanding compensation still due and from a right to future medical benefits. Relying on Collier, supra, the

Employer/Carrier contend that both Sections 33(g)(1) and 33(g)(2) mandate that written approval be secured from the Employer. The Employer/Carrier further contend that there is no exception to the written approval requirement as suggested in Dorsey, supra.

If I find that the Employer/Carrier position is correct, then the Claimant is barred from recovering compensation and future medical benefits. Accordingly, a determination, must be made regarding whether the Fifth Circuit in Collier intended to overrule the Board's decision in Dorsey.

In Collier, the Fifth Circuit began the opinion by noting that the question they had to answer was a narrow one: "does the failure by an injured employee to obtain the prior consent of the employer/carrier to settlement of the employee's claim against a third party tortfeasor bar the employee's right to future benefits under LHWCA when the employer/carrier has contractually waived their subrogation rights against the third party tortfeasor." After careful examination of Section 33(g), the Fifth Circuit held, in pertinent part:

> There is nothing in the language of Section 933 to support a 'waiver of subrogation' exception to the unqualified requirement that an employee obtain the consent of the employer and carrier for any settlement with a third party tortfeasor. To the contrary, Section 933(g)(1) is brutally direct: 'the employer shall be

> liable for compensation. . . only if written approval of the settlement is obtained from the employer and the employer's carrier' (emphasis added).

Thus, the Fifth Circuit held in Collier that where an employee is a "person entitled to compensation" under the Act, nothing in Section 33(g) supports a "waiver of subrogation" exception to the unqualified requirement that an employee obtain written consent for settlement with a third party tortfeasor. The underlying public policy rationale for that position is:

> to ensure that employer's rights are protected in a third party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. 933(b)-(f). Collier v. Petroleum Helicopters, Inc., 17 BRBS 80, 82 (1985). See also Dorsey, supra, at 27, 28.

However, the Collier decision did not rule on the issue of where benefits are not being paid, and the claimant is not a "person entitled to compensation" under the Act. Indeed, the O'Leary court, which was affirmed by the Ninth Circuit of Appeals, specially addressed and inequity of applying the presumption in a case such as the one at bar:3

The Act is clearly written with the underlying concept that the employer upon being informed of an injury will voluntarily begin to pay compensation. See 33 U.S.C. Section 914(a). The

provisions of Section 33 similarly contemplate either payments being made voluntarily or pursuant to an actual award. Section 33(g) which requires the consent of the employer to the third party settlement refers to Section 33(f) which indicates that in cases of third party settlement, the employer's liability to the claimant is for those sums in excess of that gained in the third party settlement, the very language contemplating that employer either be making voluntary payments under the Act or that it had been found liable for benefits by a judicial determination. Moreover, Section 33(b) provides:

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

This provision clearly implies an employer's rights under Section 33 derive solely from their making either voluntary payments under the Act or pursuant to an award.

Only where an employer voluntarily pays compensation or where an award is entered against the employer does it make sense to require written consent by employer to the third party settlement. To find otherwise could severely prejudice a claimant's rights.

Several reasons support this

interpretation. First, the legislative history of the 1984 Amendments indicates no congressional intent to overrule O'Leary. The 1984 Amendments did not alter the language in the 1972 Act now found in subsection (g)(1), which states that this provision only applies to a "person entitled to compensation." Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt the interpretation when it re-enacts a statute without change. Lorillard v. Pons, 434 U.S. 574, 580-81 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 N.8 (1975); NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951).

Second, this interpretation gives meaningful effect to the phrase "or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person" contained in subsection 33(g)(2). In construing a statute, a judicial body is obliged to give effect, if possible, to every word Congress used. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); U. S. v. Menasche, 348 U.S. 528, 538-39 (1955). A basic rule of construction is that a statute should be interpreted so as not to render one part inoperative. Colautti v. Franklin, 439 U.S. 379, 393 (1979). If subsection (g)(2) were interpreted to require written notice regardless of whether claimant was receiving compensation at the time of the third party settlement, as employer argues, the phrase requiring notice of any settlement of judgment would be rendered superfluous since the written

approval requirement makes any additional notification unnecessary. See Colautti, supra. Under this analysis, however, claimant must give notice to employer if he is not receiving compensation. Consequently, notice along is sufficient where the claimant is not "entitled to compensation" under subsection 33(g)(1).

Finally, this conclusion that claimant need obtain written approval of a third party settlement only when he is "entitled to compensation" is consistent with policy concerns. The Act should be construed in order to further its purpose of compensating longshoremen and harbor workers "and in a way which avoid harsh and incongruous results." Voris v. Eikel, 346 U.S. 328, 333 (1953); Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 268 (1977). If Section 33(g) was applied as employer argues, the result would be harsh and unfair. There would be no means to protect claimant against the withholding of consent by employer or its insurer in a meritorious case. In any case in which a settlement was entered into for an amount less than the compensation to which claimant would be entitled under the Act, employer would only need to withhold its written approval of the settlement thereby avoiding the payment of compensation under the Act. The purpose of Section 33(g) can be satisfied by the less restrictive approach adopted in this opinion. See Devine v. National Creative Growth, Inc., 16 BRBS 147, 154 (1982) (Opinion of Ramsey, C.J., dissenting).

Indeed, if a claimant was injured

through the negligence of a third party and the employer denied coverage under the Act, a claimant would be forced to sue the third party. However, even if the claimant obtained a reasonable settlement offer, an employer could refuse to give its consent to the third party settlement for any number of reasons, e.g., it does not wish to approve the settlement on a form provided under the Act since its consent to jurisdiction under the Act might be inferred. This could result in a claimant not being paid any compensation, yet the claimant would be afraid to make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money (the Act providing no procedure for waiving employer's consent unlike some state acts). Surely, Congress by requiring written consent could not have contemplated such a result. O'Leary, supra, at 147-149.

The Board's interpretation in Dorsey of the amended Section 33(g) follows:

> Employer contends that the phrase 'regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act,' inserted at the end of subsection 33(g)(2), overrules O'Leary4 and that compensation is therefore barred in this case regardless of the timing of the settlement. We reject this contention. We do not view this new

phrase in subsection 33(g)(2) as modifying the written approval requirement of subsection 33(g)(1). Rather, we view subsections 33(g)(1) and 33(g)(2) of the amended Act as separate provisions applicable to separate situations.

Under subsection 33(g)(1), the employer's written approval of a settlement must be obtained where employer is paying compensation as stated in O'Leary. Under subsection 33(g)(2), regardless of whether employer has made payments or acknowledged entitlement (i.e., where O'Leary does not apply), the employer must at a minimum be given notice of a settlement; written approval is not required. Thus, the statute as interpreted in O'Leary is re-enacted in subsection 33(g)(1), and an additional notice requirement in cases where the claimant is not 'entitled to compensation' under subsection 33(g)(1) is enacted in subsection 33(g)(2).

In this case, it is clear that at the time of the settlement with Transco, Claimant was not receiving compensation. Therefore, Claimant was not a "person entitled to compensation" under 33(g)(1) (emphasis added). Accordingly, the provisions of 33(g)(2) are applicable to the facts of this case. Under subsection 33(g)(2), the employer/carrier must be given notice of the settlement; written approval is not required. The record indicates that the Employer/Carrier had notice of the settlement at least 3 months before it was confected. The fact

that Employer/Carrier's written approval was not obtained is therefore irrelevant.

Based upon the foregoing findings of fact, conclusions of law, and the entire record, I make the following compensation Order. The specific dollar computations of the compensation award shall be administratively performed by the Deputy Commissioner. Interest as hereinafter provided in the Order is applicable to all past due weekly installments of compensation.

ORDER

Therefore, it is the ORDER of the Administrative Law Judge that:

1. Employer/Carrier shall pay the Claimant $6,242.17, the difference between the amount of his past due compensation ($35,592.77) and his net recovery from the third party settlement ($29,350.60).

2. Employer/Carrier shall pay for all future medical benefits related to the Claimant's July 20, 1983 injury.

3. Employer/Carrier shall pay to the Claimant interest in accordance with 28 U.S.C. 1961 on all past due benefits outstanding.

4. Claimant's attorney, within 20 days of the receipt of this Order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel who shall then have 10 days to respond with objections thereto.

Dated: November 25, 1986

New Orleans, Louisiana

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1. Under these provisions, employer is entitled to credit the proceeds of a third party settlement or judgment in a suit brought by claimant or employer, against employer's liability for

compensation under the Act.

2. While the Collier decision contained language which could be construed as supporting the Employer's position, such dicta is not controlling. Moreover, there was no discussion of either the Dorsey or O'Leary cases by the Fifth Circuit in Collier. Thus, it does not follow that the Court would expand its holding in Collier to cover the facts presented here. Under this circumstance, I am constrained to follow and fully support the Dorsey rationale.

3. The fact that Section 33(g) was subsequently amended has no affect on the legal or public policy analysis herein.

4. In O'Leary, the Board interpreted the language "person entitled to compensation" as indicating that Section 33(g) bars compensation only when employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement. See also Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982) (Ramsey, C.J., concurring in result), aff'd mem, 729 F.2d 757 (5th Cir. 1984); Caranate v. International Terminal Operating Co., 7 BRBS 248 (1977).

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APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 83-4104

EDNA KAHNY, (Widow of Don Kahny)
Petitioner,

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR and ARROW CONTRACTORS OF JEFFERSON, INC. and LIBERTY MUTUAL INSURANCE COMPANY,
Respondents.

No. 83-4109

ARROW CONTRACTORS OF JEFFERSON, INC. and LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners,

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR and EDNA KAHNY, Respondents.

Petitions for Review of an Order of the Benefits Review Board

Before POLITZ, RANDALL and JOLLY, Circuit Judges.

POLITZ, Circuit Judge:

These consolidated petitions, brought pursuant to § 21(c) of the Lonshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 921 (c), seek review of the final order of the Benefits Review Board (BRB), affirming the compensation award by an administrative law judge, in Kahny v. Arrow Contractors, Inc., 15 BRBS 212 (1982). Edna Kahny petitions for review, as does Arrow Contractors of Jefferson, Inc. and its compensation insurer, Liberty Mutual Insurance Company. We modify the award and affirm.

FACTS

Don Kahny was accidentally killed on February 22, 1979, while working for Arrow on a fixed platform on the outer continental shelf off the coast of Louisiana. Shortly thereafter, Edna Kahny, Don Kahny's widow, filed a claim for compensation benefits under the LHWCA, as extended by the Outer continental Shelf Lands Act, 43 U.S. C. § 1333(b). At the same time, she filed a tort action against the owner of the platform and the owners of the drilling rig. Arrow controverted Edna Kahny's right to receive death benefits, contending that she id not qualify as a "widow" under § 9(b) of the LHWCA, 33 U.S.C. § 909(b). After some delay, Liberty Mutual paid Edna Kahny $1,500, in reimbursement of a portion of the funeral

expenses she had incurred.

After approximately ten months, ill, unable to work, an in dire financial straits because of the loss of her husband's income, Edna Kahny authorized her attorneys to settle her tort claim for $125,000. her net recovery, after deduction of attorney's fees, was $83,333.34. Because of her financial difficulties, Edna Kahny's attorney had advanced approximately $4,000 to cover her living expenses. She repaid this loan after she received her settlement proceeds.

Twenty months after the death of Don Kahny, an ALJ heard Edna Kahny's LHWCA claim. The threshold issue was either Edna Kahny was the "widow" of Don Kahny within the intendment of the LHWCA. The ALJ allowed Arrow and Liberty Mutual an offset of the net amount received by EDna Kahny. He also allowed a credit for the $4,000 advanced by her attorneys. On appeal, the BRB affirmed the ALJ's award in its entirety.

ASSIGNMENTS OF ERROR

Arrow and Liberty Mutual contend that the ALJ and BRB erred in finding that Edna Kahny was entitled to a widow's benefits. They further contend that the ALJ and BRB erred in rejecting their defense under § 33(g) of the Act, 33 U.S. C. § 933(g). Specifically, Arrow and Liberty Mutual maintain consent, Edna Kahny forfeited all compensation benefits.

Edna Kahny contends that because of its unjustified refusal to pay compensation benefits, Arrow should not

be allowed an offset. Alternatively, she contends that the $4,000 advanced her attorneys should not be added to the amount of her net recovery in determining the offset total.

The Director of the Office of Workers' Compensation Programs, United States Department of Labor, maintains that the Arrow has no standing to invoke the bar of § 933(g) because Arrow waived the very subrogation rights that the section is designed to protect and because Arrow indemnified the platform owner from the tort claims brought by Edna Kahny. Although the Director recognized that our decision in Petro-Weld, Inc. v. Luke, 619 F.2d 418 (5th Circ. 19809), is binding precedent for this panel, he questions the soundness of the decision and hopes for its ultimate reconsideration.

DISCUSSION

1. Is Edna Kahny a "widow" under LHWCA?

Only a decedent's widow is entitled to receive death benefits under the LHWCA. Section 2(16) of the Act, 33 U.S.C. § 902(16), defines widow, in pertinent part, as "the decedent's wife . . . living with or dependent for support upon him . . . at the time of his . . . death; or living apart for justifiable cause . . . ."

The ALJ found that Don and Edna Kahny were husband and wife and were living apart for justifiable cause at the time of Don Kahny's death. WE are bound to uphold the factual findings made by the ALJ if they are supported by substantial evidence in the record considered as a whole. Universal Camera Corp. v. NLRB,

340 U.S. 474 (1951).

The record before us abounds with support the for ALJ's findings. Edna and Don Kahny were married in 1971. They lived together in North Carolina until Labor Day 1978 when Don Kahny departed for Cameron, Louisiana to seek employment in the offshore oilfields. Edna Kahny visited her husband in October 1978, staying with him at a motel in which he was temporarily living. She then returned to North Carolina to stay with her mother until her husband was able to secure a suitable home. In December 1978, Don Kahny found a mobile home in Port Arthur, Texas. Moving plans were made. On February 28, 1979, Don Kahny was to use a U-Haul trailer to move his wife and step-daughter, if she so chose, to their new home. Don Kahny's death aborted these plans. Between September 1978 and February 22, 1979, Don Kahny sent his wife money in amounts commensurate with his earnings, and the couple corresponded regularly by telephone and letters. The record includes no evidence of significant marital discord.

It is apparent that the ALJ's finding is supported by substantial evidence. The Kahnys' temporary physical separation did not break the "conjugal nexus" required by Thompson vs. Lawson, 347 U.S. 334 (1954).

2. Was Edna Kahny a "person entitled to compensation?"

The second issue presented was whether Edna Kahny was a "person entitled to compensation" under 33 U.S.C. § 933(g), which provides:

> "If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made

(emphasis added). Although it is undisputed that Kahny neither obtained Arrow Contractors' prior written approval of her out-of-court settlement nor filed the proper form with the deputy commissioner, the BRB held that § 933(g) did no bar Kahny's right to compensation because, at the time of the settlement, Arrow Contractors was making no weekly benefits payments to Kahny, either voluntarily or pursuant to an ALJ's award. In O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977), aff'd mem, 622 F.2d 595 (9th Cir. 1980), the BRB held tha a claimant is a "person entitled to compensation" within the meaning of § 933(g) only if at the time of the settlement the employer is making weekly benefits payments either voluntarily or pursuant to an ALJ's award. Based upon its view that "the very language [of § 933(g)] contemplate[es] the [the] employer either be making voluntary payments under the ACt of [be] found liable for benefits by

a judicial determination," 7 BRBS at 148, the BRB concluded that to apply the bar of § 933(g) to a situation in which the employer is not making weekly benefits payments at the time of the settlement

> could result in a claimant not being paid any compensation, yet the claimant would be afraid to make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . . .

7 BRBS at 149.

We find this analysis fully consistent with the language, legislative history, and rational of § 933(g). The critical time for the determination whether on is a "person entitled to compensation" is the time of the challenged settlement. If, at that time, the employer is not making voluntary payments and no award has been ordered by an ALJ, the claimant is not a "person entitled to compensation" under § 933(g), and is not obliged to secure prior approval for a third-party tort settlement.

3. What is the effect of the payment of funeral benefits?

In the instant case Liberty Mutual reimbursed Edna Kahny $1,500.00, as required by 33 U.S. C. § 909(a), in partial payment of the funeral expenses. In the board sense, compensation includes the funeral expense allotment, but this is not the meaning of compensation eyes used in 33 U.S. C. § 933(g). Thus, there is no merit to Arrow's contention that the $1,500.00 funeral expenses draft magically converted Edna Kahny into a "person entitled to compensation" at the

very time her right to receive compensation benefits was being denied by Arrow and Liberty Mutual. We are not persuaded by that legal legerdemain. Section 933(g). Section 933(g) presents no bar to Kahny's recovery.

Having concluded that Edna Kahny was not a person entitled to compensation under § 933(g), we need not address the issue of Arrow's standing to assert the forfeiture provisions of that section. The Director maintains that since Arrow waived its subrogation rights and, further, agreed to indemnify the platform owner for any claims made by or on behalf of its employees, it should not be allowed to raise the shield of § 933(g). We defer the resolution of that question to another panel on another day.

4. Is Arrow entitled to offset the amount of Kahny's tort settlement?

Edna Kahny asserts that the BRB erred in setting off the net amount of the third-party settlement, claiming that the waiver of subrogation rights against the platform owner precluded Arrow from reaping the benefits of the setoff provision of 33 U.S.C. § 933(f). We do not agree. That section provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b) the employer shall be required to pay as compensation under this Act, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

5. Amount of Offset:

The ALJ and BRB erred in computing the amount of offset. There is no evidence to support the allowance of a credit for

the $4,000 which the attorney made available to Edna Kahny to ease the financial distress occasioned by the death of her husband, as compounded by the failure and refusal of the employer and compensation carrier to pay timely a widow's benefits. In fact, the parties stipulated the amount of net recovery and that stipulation should have been taken as conclusive. The award is modified to delete that portion of the offset, thus allowing a total offset of $83,333.34.

The final order of the BRB, as modified herein, is AFFIRMED.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of the Claim for Compensation under the Longshoremen's and Harborworker's Compensation Act MARY V. O'LEARY, NO. 78-1339 Claimant-Respondent, v. SOUTHEAST STEVEDORE COMPANY and LIBERTY MUTUAL INSURANCE COMPANY, MEMORANDUM Petitioners, v. BENEFITS REVIEW BOARD, U.S. DEPARTMENT OF LABOR, Respondent.	)

Petition to Review a Decision of the Benefits Review Board

Before: SKELTON,* Judge, and FARRIS and PREGERSON,
Circuit Judges.

*The Honorable Byron G. Skelton,

Senior Judge of the United States Court of Claims, sitting by designation.

Southeast Stevedore Company and Liberty Mutual Insurance Company appeal the decision of the Benefits review Board awarding death benefits to Mrs. O'Leary under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. Southeast contends that because Mrs. O'Leary accepted a settlement and released her rights against Ketchikan Pulp Company, Section 33 (g) of the Longshoremen's Act, 33 U.S.C. Section 933 (g), barred her claim for the otherwise allowable death benefits. The Benefits Review Board held that Section 33(g) was not applicable for two reasons: 1) there was no final order awarding Mrs. O'Leary death benefits under the Act as the time she settled her third party claim, and 2) prior to the settlement, Southeast had refused to voluntarily pay Mrs. O'Leary compensation pending adjudication of her claim for death benefits under the Act.

Our scope of review is limited. We will uphold the Board's interpretation of the Longshoremen's Act if those interpretations are reasonable and reflect the policy of the Act. National Steel & Shibuilding Co. v. United States Dept. of Labor, 606 F.2d 875, 880 (9th Cir. 1979).

Section 33(g) provides:

> If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from

> the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

33 U.S.C. Section 933(g).

The Board reasoned that "the very language [of Section 33(g)] contemplat [es] that [the] employer either be making voluntary payments under the Act or that it had been found liable for benefits by a judicial determination." 7 BRBS 144, 148 (1977). The Board concluded that a different interpretation,

> could result in a claimant not being paid any compensation, yet the Claimant would be afraid to make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . . .

7 BRBS 144, 149 (1977).

Here, Southeast 1) never paid compensation voluntarily or pursuant to an award and 2) disclaimed any interest in Mrs. O'Leary's third party claim even though fully aware of the proposed settlement.

The dominant purpose of the Longshoremen's Act is to aid injured longshoremen and their dependents. Reed v. The Yaka, 373 U.S. 410 (1963). The Board's ruling is reasonable and furthers the underlying purpose of the Act.

Affirmed.

APPENDIX G

LEGISLATIVE HISTORY

The Bureau of the Budget has advised that there would be no objection to the submission of this legislative proposal to Congress.

Sincerely yours,

ARTHUR E. SUMMERFIELD,
Postmaster General.

HARBOR WORKERS - COMPENSATION-THIRD PARTY LIABILITY

For text of Act see p. 426

Senate Report no. 428, June 24, 1559 [To accompany H.R. 451]

House Report No. 229, Mar. 19, 1959 [To accompany H.R. 451]

The Senate Report No. 428

The Committee on Labor and Public Welfare, to whom was referred the bill (H>R. 451) to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of

compensation in cases where third persons are liable, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

BACKGROUND OF THE BILL

Like other workmen's compensation laws the Longshoremen's and Harbor Workers' Compensation Act involves a relinquishment of certain legal rights by employees in return for a similar surrender of rights by employers. Employees are assured hospital and medical care and subsistence during convalescence. Employers are assured that regardless of fault their liability to an injured workman is limited under the act. In some instances injury to an employee is caused by a third party. In such circumstances, section 33 of the act reserves to the employee the right to seek damages against the third party.

Section 5 of the Longshoremen's Act makes the statutory liability of an employer of the exclusive liability for injury to an employee arising out of employment. This section also reserves to the employee the right to recover damages against third parties causing injury.

Section 5 of the Longshoremen's Act makes the statutory liability of an employer the exclusive liability for injury to an employee arising out of employment. This section also reserves the employee the right to recover damages against third parties causing injury.

However, in exercising his right to sue a third party for damages under section 33 of existing law, the employee

must choose whether to collect the compensation to which he is entitled or to pursue the third-party suit. He may not pursue both courses.

Existing law works on hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party. His compensation under the act is certain but his chances of winning a third-party liability suit are uncertain. In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit. Circumstances like these are ready made for the unscrupulous who have been known to "stake" an injured employee while pursuing a damage suit--those who, in effect, purchases an injured employee's claim for their own monetary advantage.

PURPOSE OF THE BILL

The bill as amended by the committee would revise section 33 of the act so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the act. The principle underlying the modification of the law made by this bill, is embodied in most modern State workmen's compensation law.s The committee believes that in theory and practice this is sound approach to what has been a difficult problem. As embodied in the committee amendment, the principle would be applied with due recognition of the equities and right of all who are involved.

Although an employee could receive compensation under the act and for the same injury recover damages in a third-party suit, he would not be entitled to double compensation. The bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee received four-fifths of the amount after necessary expenses, approved by the Deputy Commissioner, and all benefits and compensation have been deducted. Thus by giving the employer a reasonable (one-fifth) share in the net recovery an incentive is provided not to compromise a suit only for the amount of compensation but to protect the interests of the employee as much as possible.

The other major provision of the bill relates to the immunization of fellow employees against damage suits. The rational of this change in the law is that when an employee goes to work in a hazardous industry he encounters two risks. First, the risks inherent in the hazardous work and second, the risk that the might negligently hurt someone else and thereby incur a large common-law damage liability. While it is true that this provision limits an employee's rights, it would at the same time expand them by immunizing him against suits where he negligently injures a fellow worker. It simply means that rights and liabilities arising within the "employee family" will be settled within the framework of the Longshoremen's and Harbor Workers' Compensation Act.

The bill as amended by the committee provides greater protection to injured workers and corrects defects in existing

law. It carefully protects the interests of all who are involved and balances the equities. The bill as amended has the support of both labor and industry and the endorsement of both the Labor Department and the Bureau of the Budget. The views of the executive agencies are expressed in the letters which follow:

U.S. Department of Labor.
Office Of The Secretary
Washington, May 1, 1959.

Honorable Lister Hill,
Chairman, Committee on Labor and Public Welfare, U.S. Senate, Washington, D.C.

Dear Senator Hill:

This is in further response to your request for a report on H.R. 451, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable.

This bill would amend section 33 of the act, which describes the relative rights of employers and employees under the act when a third party is responsible for ran injury which is also compensable under the act. The primary purpose of the bill apparently is to eliminate the present requirement of an immediate election either to take benefits under the act or to pursue a remedy against the third party. Under certain circumstances, it would permit acceptance of compensation benefits and an action by the employee cr his representative against the third party. On the other hand, if compensation were accepted without instituting an action against the third party within the period allowed in the bill, the cause of action would be assigned to the carrier after it had

given the required notice. Two-thirds of any amount recovered by the carrier in excess of its compensation liability, after the deduction of reasonable expenses, would be payable to the employee of his eligible survivors.

In general, H.R. 451 appears to follow the pattern of the New York workmen's compensation law and would make significant changes with respect to the rights and liabilities of the parties in interest. This Department would not object in principle to what seems to be the primary purpose of the bill. However, it has several features which we find objectionable, for the reasons described in the enclosed comments on H.R. 451. We are enclsoing, as a substitute for H.R. 541, suggested language to remedy these defects. Also enclosed is a Ramseyer of the Department's amendment, and an explanation of this proposal.

Time has not permitted us to determine the views of the Bureaus of the Budget on the submission of this report.

Sincerely yours,

JAMES T. O'CONNELL,
Acting Secretary of Labor.

Executive Office Of The President,
Bureau Of The Budget,
Washington, D.C., May 22, 1959.

Honorable Lister Hill,
Chairman, Committee on Labor and Public Welfare, U.S. Senate, Washington, D.C.

Dear My Mr. Chairman: This is in reply to your letter of April 17, 1959, requesting the views of the Bureau of the Budget on H.R. 451, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the

payment of compensation in cases where third persons are liable.

As an attachment to its report, forwarded to your committee on May 1, 1959, the Department of Labor has submitted a substitute for H.R. 451 which accomplishes the major purpose of that bill while correcting certain of its features which were found to be objectionable.

The Bureau of the Budget concurs with the views of the Department of Labor and prefers enactment of the substitute bill proposed by that Department instead of H.R. 451.

Sincerely yours,

(Signed) PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

No. 91-17

In the Supreme Court of the United States

OCTOBER TERM, 1991

ESTATE OF FLOYD COWART, PETITIONER

v.

NICKLOS DRILLING CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g), provides that the rights of a "person entitled to compensation" shall be terminated if the person settles a claim against a third person for less than the compensation payable under the LHWCA without obtaining his employer's prior written approval. The question presented is whether the termination-of-rights provision applies when the person who settles the claim without employer approval is not, at the time of the settlement, receiving compensation from his employer and has not been determined to be entitled to it.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. A) is reported at 927 F.2d 828. The panel opinion of the court of appeals (Pet. App. B) is reported at 907 F.2d 1552. The decision and order of the Benefits Review Board (Pet. App. C) is reported at 23 Ben. Rev. Bd. Serv. (MB) 42. The decision and order of the administrative law judge (ALJ) (Pet. App. D) is reported at 19 Ben. Rev. Bd. Serv. (MB) 457.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1991. The petition for a writ of certiorari was filed on June 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) requires employers to pay compensation to covered employees and their survivors for work-related injuries that result in disability or death, 33 U.S.C. 908, 909, and to provide medical services for covered injuries. 33 U.S.C. 907. A "person entitled to * * * compensation" under the LHWCA, however, may also recover damages from a third person. 33 U.S.C. 933(a). If the person does so recover, the employer receives a credit against the LHWCA compensation to the extent of the employee's "net" recovery against the third party (defined as the employee's actual recovery less his reasonable expenses including attorney's fees). See 33 U.S.C. 933(f).[1]

Section 33(g)(1) of the LHWCA provides a special rule for cases in which "the person entitled to compensation" settles the third-party action for less than the amount of compensation to which the person would be entitled under the LHWCA. 33 U.S.C. 933(g)(1). In such cases, the employer is liable for the difference between the settlement and the LHWCA compensation due "only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed." *Ibid.* In addition,

[1] The LHWCA also provides a mechanism for an employer that is required to pay compensation to assert the employee's third-party claim if the employee does not. If the employee accepts an award of compensation and does not assert the third-party claim within six months, the employer may, within 90 days thereafter, sue the third person on assignment of the employee's cause of action. 33 U.S.C. 933(b) and (d). From any recovery (net of attorney's fees and costs), the employer is entitled to recoup its payments to the employee and to retain the present value of estimated future compensation payments. See 33 U.S.C. 933(e).

> [i]f no written approval of the settlement is obtained and filed as required by [Section 33(g)(1)], or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under [the LHWCA] shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under [the LHWCA].

33 U.S.C. 933(g)(2).

2. On July 20, 1983, Floyd Cowart injured his hand while working on an oil drilling platform. Pet. App. B3, D5, D7.[2] His employer, Nicklos Drilling Co., through its insurer, Compass Insurance Co., paid him temporary total disability benefits from July 21, 1983, through May 21, 1984, when he was released to return to work. Pet. App. B3-B4, D7-D8. Nicklos did not pay Cowart for any permanent disability, however, despite Department of Labor notification that such payments were due. Pet. App. D8-D9.[3] On July 1, 1985, Cowart settled a tort suit against a third person (the owner of the platform) for $45,000, with prior notice to Nicklos but without its written consent. Pet. App. D9, D25. The net amount of the settlement was

[2] Because the platform was on the Outer Continental Shelf, the LHWCA governed his disability claim. See 43 U.S.C. 1333(b); Pet. App. D1-D2.

[3] Section 14(a) of the LHWCA, 33 U.S.C. 914(a), requires an employer to pay compensation promptly without an award. Section 14(e), 33 U.S.C. 914(e), creates an incentive for prompt payment by increasing an employer's liability by 10% if it does not pay or contest eligibility within 14 days of notice. If the employer contests or does not pay, the claimant may file a claim and, if successful, obtain a formal award. 33 U.S.C. 913, 919.

$29,350.60; the LHWCA compensation amount was $35,592.77. Pet. App. D9.

After settling, Cowart filed an administrative claim seeking the difference between the settlement amount and the compensation due under the LHWCA, as well as future medical benefits and interest. See Pet. App. B4, D26-D27. Nicklos stipulated that Cowart's hand was permanently partially disabled, *id.* at D6, but argued that Cowart's failure to obtain Nicklos's written consent to the settlement relieved Nicklos of its obligation to pay further compensation or medical benefits. *Id.* at D2-D3. Relying on Benefits Review Board precedents, the administrative law judge (ALJ) rejected that contention. The ALJ held that the employer's consent was not necessary since, at the time Cowart executed the settlement, he was not a "person entitled to compensation" under 33 U.S.C. 933 (g)(1) because he was not receiving benefits. Pet. App. D10-D25, citing *O'Leary* v. *Southeast Stevedoring Co.*, 7 Ben. Rev. Bd. Serv. (MB) 144 (1977), aff'd mem., 622 F.2d 595 (9th Cir. 1980); *Dorsey* v. *Cooper Stevedoring Co.*, 18 Ben. Rev. Bd. Serv. (MB) 25 (1986), appeal dismissed, 826 F.2d 1011 (11th Cir. 1987).

The Benefits Review Board affirmed. Pet. App. C1-C26. It stated that prior to the 1984 amendments to the LHWCA,[4] the Board had ruled that "a claimant was a 'person entitled to compensation' within the meaning of Section 33(g)" only "if [the] employer was paying benefits either voluntarily or pursuant to an award at the time of the third party settlement." Pet. App. C15. If the claimant "was not receiving benefits," the Board stated, the prior approval requirement of Section 33(g) "did not apply." Pet. App. C15. The Board reaffirmed its view that the LHWCA as amended in 1984 continued to carry the same meaning, reasoning that such a construction is necessary to give effect to all parts of the statute and, moreover, is sufficient to protect an employer's lien interest in a third-party recovery under Section 33(f), 33 U.S.C. 933(f).[5] Pet. App. C15-C17.

[4] See Pub. L. No. 98-426, § 21(d), 98 Stat. 1652 (1984), adding Section 33(g)(2), quoted at page 3, *supra*.

3. A panel of the court of appeals vacated the Board's decision and order. Pet. App. B1-B9. The court stated that under Section 33(g)(1), there are no exceptions to the "unqualified" requirement that an employer is liable for compensation only if the employer and its carrier had given written approval to the third-party settlement. Pet. App. B8-B9. Thus, "future LHWCA benefits must be denied an employee who fails to obtain prior consent by his employer/carrier to the settlement of his claim against a third party tortfeaser." Pet. App. B2-B3.

4. To resolve a conflict with the court's earlier unpublished decision in *Kahny* v *Director, OWCP*, 729 F.2d 777 (5th Cir. 1984) (Table), the court of appeals granted suggestions for rehearing en banc filed by the Director, Office of Workers' Compensation Programs [6] and petitioner, and affirmed the panel de-

[5] As construed by the courts, Section 33(f) allows the employer a lien on the claimant's net tort recovery so that the employer can recoup compensation already paid. See *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 80-81 & n.6 (1980); *Ochoa* v. *Employers National Ins. Co.*, 754 F.2d 1196 (5th Cir. 1985).

[6] Under Section 39(a) of the LHWCA, "the Secretary [of Labor] shall administer the provisions of this chapter." 33 U.S.C. 939(a). The Secretary has assigned that administrative responsibility to the Director. 20 C.F.R. 802.410(b). See *Director, OWCP* v. *Perini North River Associates*, 459

cision. Pet. App. A4, A20.[7] Applying *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court held that Section 33(g) unambiguously requires an employer's prior written approval of settlements for less than the compensation due, whether or not a claimant is receiving LHWCA compensation at the time of settlement. The court therefore refused to defer to the Director's contrary interpretation. Pet. App. A12-A16.

For three reasons, the court rejected the Director's argument that "[t]he actual payment of benefits * * * is the price which Congress intended employers to pay for the right of prior approval." Pet. App. A9. First, the court found no textual exceptions to the approval requirement set forth in Section 33. Pet. App. A16-A17. Second, the court pointed out that Section 33(g)(2) terminates benefits for noncompliance "regardless of whether the employer * * * has made payments or acknowledged entitlement to benefits under this subchapter," 33 U.S.C. 933(g)(2); that provision, the court stated, "squarely refutes" the Director's argument that the employer's actual payment of benefits was intended to be the *quid pro quo* for the employer's right of prior approval. Pet. App. A17. Finally, the court saw no need to accept the Director's reading of Section 33(g) in order to

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U.S. 297, 302 n.9 (1983). The Director participated as a respondent in the court of appeals.

[7] The court also granted rehearing en banc in a companion case raising the same issue, *Petroleum Helicopters, Inc.* v. *Barger*, 910 F.2d 276 (5th Cir. 1990), and similarly affirmed the decision vacating the Board's order. See Pet. App. A7, A20. The claimant's petition for certiorari in that case is pending as *Barger* v. *Petroleum Helicopters, Inc.*, No. 91-284.

prevent financial hardship to claimants pursuing civil remedies. Any hardship on claimants, the court indicated, was a "self-inflicted" result of their decision "to ignore their rights and responsibilities" under 33 U.S.C. 933(g). Pet. App. A18.

The court also rejected the Director's claim that his construction is necessary to give meaning to the requirement in Section 33(g)(2) that "employee[s]" must notify their employers of "any settlement obtained from or judgment rendered against a third person." 33 U.S.C. 933(g)(2). The Director argued that if the approval requirement were applied to all settling claimants, including those who were not receiving benefits, the notice provision would be superfluous because the employer would be aware of all settlements from having approved them.[8] The court, however, stated that the quoted phrase in Section 33(g)(2) not only "extends the notification requirement to judgments," but also applies to settlements "for an amount exceeding [a claimant's] LHWCA compensation entitlement." The approval requirement, in contrast, applies only to settlements for less than a claimant's LHWCA compensation entitlement. Thus, the court did not believe that its interpretation rendered the notice requirement superfluous. Pet. App. A18-A19.

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[8] The Director argued (C.A. Supp. Br. 19) that Section 33(g) distinguishes between two kinds of settlements for less than the amount of LHWCA compensation: those where a claimant was receiving benefits at the time of settlement and those where he was not. According to the Director, the former class, constituting "person[s] entitled to compensation," is governed by Section 33(g)(1)'s approval requirement; the latter is governed by Section 33(g)(2)'s notification requirement.

Finding that "Congress has spoken unambiguously" in requiring all employees to obtain prior approval, the court concluded that the Director's interpretation of the statute was not entitled to deference. Pet. App. A20.

Three judges dissented. Pet. App. A20-A27. They found the Director's interpretation of "person entitled to compensation" reasonable and entitled to deference. In particular, the dissent saw no valid reason why an employee who has been denied compensation must "go hat in hand to the employer and request permission to settle his claim," Pet. App. A24; such a result would serve only to foreclose a legitimate compensation claim. Pet. App. A25-A26. The dissent also found no evidence that Congress intended to overrule the Director's interpretation when it added Section 33(g)(2) in the 1984 LHWCA amendments; rather, the dissent interpreted Congress's reenactment of the phrase "person entitled to compensation" as approval of the administrative and judicial construction, and agreed with the Director that Section 33(g)(2)'s notification requirement "adds to the force of the Director's construction" by requiring notification but not approval whether compensation is being paid or not. Pet. App. A26-A27.

ARGUMENT

Petitioner contends (Pet. 11-52) that the court of appeals erred in holding that Section 33(g) of the LHWCA requires an employer's written approval of all third-party settlements for less than the compensation due, even when the employee is not receiving LHWCA compensation at the time of settlement. The court concluded that the plain language of Section 33(g) dictates that result, and therefore declined to defer to the position asserted by the Director, supported by a line of Benefits Review Board decisions, that a "person entitled to compensation" is a person actually receiving LHWCA benefits at the time of a settlement.

The competing interpretations of Section 33(g) advanced by the Director and the court of appeals may warrant this Court's attention in an appropriate case. In our view, however, the issue is not ripe for review at this time. The Fifth Circuit is the only court of appeals to have issued a published appellate decision addressing the issue, and there is, accordingly, no conflict in the circuits. Nor is there any decision of this Court that addresses the issue. In light of the dearth of reported decisions considering this issue, review by this Court would be premature.[9]

We do not agree with petitioner's claim (Pet. 52-53) that the court of appeals' decision conflicts with *Bethlehem Steel Corp.* v. *Mobley*, 920 F.2d 558 (9th Cir. 1990). There, the court held that the employer's approval of a settlement was not required because the claimant "did not enter into a settlement for 'less

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[9] The Director has informed us that the issue is pending before the Ninth Circuit. See *Cretan* v. *Bethlehem Steel Corp.*, 24 Ben. Rev. Bd. Serv. (MB) 35 (1990), petitions for review pending, Nos. 90-70589 & 90-70634.

than the compensation' to which he was actually entitled." *Id.* at 560. The court expressly declined to "address the Board's alternative holding that * * * prior approval is required only when the settlement is reached after the employee has begun receiving compensation from the employer," *id.* at 560 n.3—the issue presented here.[10] Nor is there a conflict based on *O'Leary* v. *Southeast Stevedoring Co.*, 7 Ben. Rev. Bd. Serv. (MB) 144 (1977), aff'd mem., 622 F.2d 595 (9th Cir. 1980). The Ninth Circuit's unpublished affirmance in *O'Leary* has no precedential force in that circuit. See 9th Cir. R. 36-3.[11] In any event, *O'Leary* was decided before Congress amended the LHWCA in 1984 to impose the notice requirement on settling employees and to make the forfeiture-of-benefits rule applicable "regardless of whether the employer * * * has made payments or acknowledged entitlement to benefits under this [chapter]." See Pub. L. No. 98-426, § 21(d), 98 Stat. 1652 (1984), adding 33 U.S.C. 933(g)(2). At most, therefore, *O'Leary* applies only to the earlier

[10] The court in *Mobley* went on to hold that an employee does not have to notify an employer of a settlement as soon as it is entered, stating that "[s]o long as the employer has notice of the settlement before it has made any payments and before the Agency orders it to make any payments, the purposes of the statute are satisfied." 920 F.2d at 561. Because that statement addresses the *time* for notification under Section 33(g)(2), and not the meaning of "person entitled to compensation" under Section 33(g)(1), petitioner errs (Pet. 52-53) in relying on it.

[11] Indeed, when the Ninth Circuit in *Mobley* stated that it was not addressing the issue raised in this case, it referred only to the Board's decision in *O'Leary*, not to its own (unpublished) decision. 920 F.2d at 560 n.3.

version of Section 33(g), not to the amended LHWCA at issue in this case.

Nor is it clear that the impact of the Fifth Circuit's decision on claimants is so great that review is required at this time. To be sure, the Director informs us that the Fifth Circuit's decision generally would make it more difficult for claimants to pursue both tort remedies and LHWCA compensation. There are likely to be situations where injured workers receive no compensation while they are pursuing tort damages, and then are presented with proposed settlements in third-party actions for less than their potential compensation. Employers may, for a variety of reasons, withhold approval of such settlements. The claimant then has a Hobson's choice of either accepting an immediate settlement and forfeiting any LHWCA rights or foregoing any monetary relief for years.

But the potentially harsh consequences of the decision are tempered by several factors. First, claimants who have a disease but are not yet disabled may be able to settle third-party suits without employer approval, even under the Fifth Circuit's interpretation of the statute. See Pet. 60. As the court reasoned in *Mobley*, 920 F.2d at 560, such settlements would not be for " 'less than the compensation' to which [the claimant] was actually entitled," and would therefore not be subject to the approval requirement, since an employee who is not yet disabled is not entitled to compensation. See also *Jones* v. *St. John Stevedoring Co.*, 18 Ben. Rev. Bd. Serv. (MB) 68, 72 (1986), aff'd in part and rev'd in part on other grounds *sub nom. St. John Stevedoring Co.* v. *Wilfred*, 818 F.2d 397, 400 (5th Cir.), cert. denied, 484 U.S. 976 (1987).

Second, it is not clear to what extent the Fifth Circuit's decision will require dismissal of the LHWCA claims of employees who have settled third-party actions but have not yet received compensation. As petitioner notes, one Fifth Circuit employer has moved to dismiss more than 3,000 pending deficiency claims. Pet. 56. But in some of these cases, as in *Barger* v. *Petroleum Helicopters, Inc.*, petition for cert. pending, No. 91-284, it will likely be disputed whether the disposition of a third-party suit was a settlement, see 91-284 Pet. App. 66a-67a, 70a n.2, for an amount less than the LHWCA compensation,[12] and was otherwise subject to Section 33's approval requirements. Cf. *United Brands Co.* v. *Melton*, 594 F.2d 1068, 1073-1074 (5th Cir. 1979). These factual questions will have to be determined on a case-by-case basis.

Finally, it is unlikely that employers will succeed in obtaining reimbursement from claimants who already have received compensation after settling third-party actions without an employer's consent. See Pet. 54-55. In cases that have already been adjudicated, res judicata would likely bar employers from raising this argument. See *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439, 2446 (1991) (opinion of Souter, J.); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 122-123 (1988); *Downs* v. *Director, OWCP*, 803 F.2d 193, 199 n.13 (5th Cir. 1986). In other pending cases, the Director construes the LHWCA to prohibit the recovery of overpaid compensation except by an offset against future, unpaid compensation that is

[12] In the instant case, for example, the Director argued below that petitioner had not settled his third-party suit for an amount less than his LHWCA compensation because the full settlement was for more than this compensation even though the net settlement was for less. See 33 U.S.C. 933(f). The court of appeals did not address this argument, and petitioner has not raised it in his petition.

not yet due. See 33 U.S.C. 908(j), 914(j), 922 (all allowing such future offsets but no other methods of recovery).[13] See also *Travelers Ins. Co.* v. *Haden*, 418 A.2d 1078, 1082-1084 (D.C. App. 1980) (finding no authority for reimbursement under pre-1984 version of Section 33(g)).

In view of these mitigating factors with respect to the decision's practical impact, and the absence of any circuit conflict, we do not believe that review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1991

[13] Whether the LHWCA allows reimbursement other than by offset is pending in *Stevedoring Services of America, Inc.* v. *Eggert*, No. 90-35015 (9th Cir.); *Pacific Marine Ins. Co.* v. *Director, OWCP*, No. 91-70017 (9th Cir.); and *Ceres Gulf* v. *Cooper*, No. 91-2097 (5th Cir.). See also *Bethlehem Shipbuilding Corp.* v. *Cardillo*, 102 F.2d 299, 302 (1st Cir.) (construing 33 U.S.C. 922 to mean that "the insurer in no case receives back any compensation previously paid but may have prior excess payments credited or allowed upon a present award"), cert. denied, 307 U.S. 645 (1939).

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(3)

NO. 91-17

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OCTOBER TERM, 1991

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Petitioner

v.

NICKLOS DRILLING COMPANY and
COMPASS INSURANCE COMPANY,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS NICKLOS DRILLING COMPANY and COMPASS INSURANCE COMPANY

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BRIEF IN OPPOSITION OF RESPONDENTS NICKLOS DRILLING COMPANY and COMPASS INSURANCE COMPANY[1]

STATEMENT

The statements of the case contained in the petition filed by Petitioner Cowart and in the brief in opposition for the Federal Respondent are generally correct. However, the assertion by Petitioner that Respondent Nicklos

1. There are no parent or subsidiary companies to be listed for Respondent Nicklos Drilling Company in compliance with Supreme Court Rule 29.1. Respondent Compass Insurance Company is a subsidiary of Armco Steel Corp.

failed to pay LHWCA[2] benefits to Cowart after acknowledging liability therefor and being "instructed by the Director to pay said benefits" [Pet. 7-8] is not correct.

Cowart made a claim against his employer (Nicklos) and its carrier (Compass) for benefits under LHWCA for an accidental injury sustained on July 20, 1983, and also filed a civil suit against a third party in the U. S. District Court for the Eastern District of Louisiana seeking to recover damages for the same accidental injury. The carrier paid Cowart benefits for temporary total disability from the date of the injury until May 21, 1984, when he was released to return to work. These payments were voluntary, pursuant to 33 U.S.C. § 914(a), and no formal compensation award was made. Despite Petitioner's assertion that Cowart was "automatically entitled" to additional benefits, his employer and carrier never acquiesced in any such claim, and no formal claim to such effect was ever presented by Cowart to the Department of Labor after voluntary benefits were terminated and before he had consummated his third party settlement over thirteen months later. Cowart settled his third party suit on July 1, 1985 without obtaining the written approval of the employer or carrier as required by 33 U.S.C. § 933(g).

ARGUMENT

There is no conflict among the Circuits on the issue presented by this petition. Only the Fifth Circuit has

2. Longshore and Harbor Workers' Compensation Act, 933 U.S.C. § 901, *et seq.*

published an opinion addressing the issue.[3] The only real "conflict" arises out of the persistent effort of the Director of the Office of Workers' Compensation Programs to delete, or at least dilute, the language of Section 33(g) of the LHWCA (33 U.S.C. § 933(g)). In this effort, the Director has found a compliant agency in the Department of Labor's Benefits Review Board.

The BRB's seminal case on the issue[4] is *Dorsey v. Cooper Stevedoring Co., Inc.*, 18 B.R.B.S. 25 (1986). In *Dorsey*, the BRB articulated a construct of § 933(g) which holds that its two subsections apply to distinct situations: The applicability of § 933(g), subsection (1), is contingent upon the condition that the employee is receiving LHWCA benefits *at the time* of a third party settlement; otherwise, subsection (2) applies. Furthermore, this construct holds that only a "subsection (1) employee" is required to comply with the "written approval" requirement, whereas a "subsection (2) employee" is given the option of merely notifying his employer and its carrier that he has made such a settlement. *Id.*, 18 B.R.B.S. at 29. The BRB rationalizes this con-

3. As demonstrated in the brief in opposition for the Federal Respondent filed by the Solicitor General, there is no conflict between the holding of the Fifth Circuit in the present case and the Ninth Circuit's opinion in *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558 (9th Cir. 1990). Brief for Federal Respondent, 9-10.

4. Subsequent to the 1984 amendments to the LHWCA, that is. A case extensively discussed by Petitioner, *O'Leary v. Southeast Stevedoring Co.*, 7 B.R.B.S. 144 (1979), aff'd mem., 622 F.2d 595 (9th Cir. 1980), was decided before Congress amended § 33(g) in 1984 to impose the notice requirement on settling employees and to make the forfeiture-of-benefits rule applicable "regardless of whether the employer * * * has made payments or acknowledged entitlement to benefits under this [chapter]. O'Leary was decided on the basis of the predecessor version of § 33(g), before subsection (2) was added by amendment.

struct by interpreting the phrase in the first sentence of § 933(g)(1)—"person entitled to compensation"—to mean "one who is receiving compensation payments voluntarily at the time he settles his claim with a third party"; and further by construing the subordinate clauses joined by the conjunction "or" in § 933(g)(2) as affordinging the employee an option of eschewing compliance with the "written approval" requirement and substituting simple notice to the employer/carrier instead. *Id.*, 18 B.R.B.S. at 29-31.

The Fifth Circuit rejected this construct in *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644 (5th Cir. 1986). In that case the BRB had affirmed an Administrative Law Judge's order awarding future compensation benefits to a claimant notwithstanding his failure to obtain approval of his employer and its carrier of a settlement of a third party liability action. The claimant in *Collier* contended that the requirement of § 933(g) was "suspended" because his employer and the carrier had contractually waived their own subrogation rights against the third party tortfeasor. The Fifth Circuit pointed out that there is nothing in the language of § 933(g) to support an exception to the "unqualified requirement that an employee obtain the consent of the employer and carrier for any settlement with a third party tortfeasor", adding the following comment:

> * * * To the contrary, § 933(g)(1) is brutally direct: 'the employer shall be liable for compensation . . . *only* if written approval of the settlement is obtained from the employer and the employer's carrier' (emphasis added).

784 F.2d at 647.

Undaunted, the BRB refused to follow *Collier* in the present case, complaining that the Fifth Circuit had failed to consider "[t]he changes made in § 933(g) in 1984 with the addition of § 933(g)(2) and their effect on claimants who were not paid benefits voluntarily or pursuant to an award * * *." Decision and Order of the BRB, p. 4. Actually, the Fifth Circuit expressly discussed § 933(g)(2) in its opinion in *Collier* and found the language of that subsection to be reinforcing of its holding in that case:

> * * * As if the language of § 933(g)(1) weren't clear enough, the mandatory nature of the written approval requirement is reiterated in § 933(g)(2), *so that the two provisions frame an unmistakable scheme* * * *.

784 F.2d at 647 (emphasis added). Moreover, the Fifth Circuit went on in its opinion to quote directly from the legislative history of the 1984 amendments to the LHWCA and observe that it "admits no exception to the written approval requirement". *Id.*

The BRB's construct of § 933(g) is fraught with logical and semantical flaws. In the first place, if a claimant is not a "person entitled to compensation" at the time of his third party settlement, by what alchemy does he thereafter acquire entitlement to compensation for a claim arising out of the same injury? (In the present case, the ALJ found that Cowart had a scheduled injury which "automatically entitled" him to additional benefits for a period of seventy-five weeks commencing on May 22, 1984, but then determined that he was not a "person entitled to compensation" at the time he confected his third party settlement fifty-eight weeks later on July 1,

1985. Decision and Order of the A.L.J. of November 25, 1986 at p. 3). From this inconsistency alone, the suggested interpretation of this phrase makes poor sense.

By the same token, while the BRB asserted in *Dorsey* that its "disjunctive alternative" reading of § 933(g)(2) is necessary to avoid rendering the "notification" phrase mere surplusage, *Id.*, 18 B.R.B.S. at 30, in fact the grammatically sound interpretation is that the claimant is obliged to do both, i.e., obtain "written approval" *and* give notification, and that the failure to do one or the other yields the result that "all rights to compensation and medical benefits under this chapter shall be terminated * * *." The "notification" requirement extends to both settlements *and* judgments rendered against third persons, which suggests its distinct purpose: The employer/carrier's written approval is of no effect in the case of a *judgment* against a third party, but *notice* of such recovery is necessary in order to claim the offset allowed by § 933(f).

In this case as in its prior decision in *Collier*, the Fifth Circuit has rejected out-of-hand the contention of Petitioner that there can be *any* exceptions to the "written consent" requirements of § 933(g) and accordingly held that it would "tolerate the engraftment of none by the BRB." "Engraft" is an apt choice of words, for this is plainly what Petitioner, the BRB and the Director would have the Court do, i.e., engraft an exception upon the "written approval" requirement of § 933(g) which is not to be found on the face of the statute. The wording of § 933(g) is, as the Court said in *Collier*, "brutally direct," and there is nothing in the legislative history which suggests that Congress intended anything other than precisely what it said. 784 F.2d at 647.

All of Petitioner's laments about the alleged deleterious impact of this statutory procedure upon LHWCA claimants in various circumstances, and the appeals to what Petitioner perceives as the better operation of the LHWCA, reveal that Petitioner's real quarrel is with the statute itself. Along with the Director and the BRB, Petitioner does not like the "written approval" requirement of § 933(g). Petitioner's argument is properly addressed to Congress, because whether or not there is a good reason for the procedure to be as it is, the Fifth Circuit is plainly correct in the discharge of its duty by applying the statute as it is written.

CONCLUSION

This is not a case presenting an issue which is subject of conflicting decisions in the lower federal courts, nor does it involve a matter of statutory ambiguity, nor is there any legislative history suggesting the basis for a judicial gloss upon the unvarnished wording of the statutory provision in issue. The Fifth Circuit properly rejected the invitation to effectively rewrite the congressional act by adopting the distorting administrative construct contended for by Petitioner, and previously urged by the Director and adopted by the B.R.B. The necessity for the exercise of this Court's jurisdiction has not been demonstrated by the petition for writ of certiorari, and the petition should be denied.

Respectfully submitted,

GRIGGS & HARRISON

By: _____

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No. 91-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE ESTATE OF FLOYD COWARD
Petitioner,

versus

NICKLOS DRILLING COMPANY and
COMPASS INSURANCE COMPANY,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 27, 1991
CERTIORARI GRANTED DECEMBER 9, 1991

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and American Home Assurance
Company, Petitioners

v.

Mary E. BARGER and Director, Office of
Workers' Compensation Programs,
United States Department of Labor,
Respondents

Nos. 89-4944, 90-1022

United States Court of Appeals
Fifth Circuit

March 29, 1991

Appeal was taken from decision of Benefits Review Board which affirmed award of Longshore and Harbor Workers' Compensation Act (LHWCA) benefits to

injured employee. In second action, employer petitioned for review of Benefits Review Board decision affirming award of LHWCA benefits to widow of employee killed in helicopter crash. The Court of Appeals, 907 F.2d 1552, 910 F.2d 276, vacated and remanded both cases. On further review of cases, consolidated on appeal, the Court of Appeals, en banc, held that LHWCA conditions eligibility for continuing benefits on employer's and employer's insurance carrier's prior written approval of any settlement between injured employee and third person for less than employee's LHWCA compensation settlement, regardless of whether employer or employer's insurer was paying LHWCA benefits at time of settlement.

Affirmed.

Politz, Circuit Judge, filed dissenting opinion in which King and Johnson, Circuit Judges, joined.

On Petition for Review of a Decision and Order of The Benefits Review Board, U.S. Department of Labor.

Before CLARK, Chief Judge, GEE*, POLITZ, KING, JOHNSON, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER and BARKSDALE, Circuit Judges.

PER CURIAM:

Today we sit en banc to resolve a conflict in the law of our Circuit. In the cases consolidated on this appeal, two panels of our Court held that section 33 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. Section 933 (1988), conditions eligibility for continuing LHWCA benefits on the

employer's and the employer's insurance carrier's prior written approval of any settlement between an injured employee and a third person for less than his LHWCA compensation entitlement; and we further held that this approval requirement applies regardless of whether the employer or the employer's insurer was paying LHWCA benefits at the time of settlement. See also Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644,647 (5th Cir.1986). In an unpublished opinion, Kahny v. Director, Office of Workers' Compensation Programs, 729 F.2d 777 (5th Cir.1984), a panel of our Court held the contrary: that section 33's approval requirement applies only if the employer or its carrier is paying LHWCA benefits at the time of the settlement.

Resolving this conflict, we now hold that the plain language of section 33 shows Congress' unambiguous intent to require prior approval whether or not the employer or its carrier was actually paying LHWCA benefits at the time of settlement. In the face of this manifest congressional intent, no administrative reinterpretation can be countenanced.

Background

In each case before us today, a person seeking LHWCA compensation for death or injury settled a related claim with a third person; and in each case, the settlement occurred at a time when the person was not receiving LHWCA benefits, was for less than the employee's compensation entitlement, and was consummated without the approval of

the employer or his carrier. In Nicklos Drilling Co. v. Cowart, 907 F.2d 1552 (5th Cir.1990), Floyd Cowart, an employee of Nicklos Drilling Company, sought LHWCA compensation for injuries he had received on Nicklos' drilling rig. At a time when Mr. Cowart was not receiving LHWCA benefits from Nicklos or its insurance carrier, he settled his claim against Transco Exploration Company, which owned the offshore platform that supported Nicklos' rig. In Petroleum Helicopters, Inc. v. Barger, 910 F.2d 276 (5th Cir.1990), Mary Barger, the widow of Walter Barger, sought LHWCA compensation for her husband's death. Mr. Barger died when the helicopter that he was piloting crashed. The helicopter was owned by his employer, Petroleum Helicopters, Inc.

(PHI), and manufactured by Bell Helicopter Textron. Ms. Barger settled her claim against Bell at a time when she was not receiving LHWCA benefits from either PHI or its insurance carrier. The panel opinions contain more detailed accounts of the facts.

Review of an Administrative Interpretation

Generally, the question before us is whether section 33 of the LHWCA permits any exception to its requirement that all settlements with third persons that leave the employer liable for further compensation benefits have the prior written approval of the employer and the employer's insurance carrier. Specifically, the Office of Workers' Compensation Programs (OWCP) urges us to

accept its in-house administrative interpretation that section 33 requires prior written approval only if the employer or its carrier is actually paying LHWCA benefits at the time of settlement. In Kahny we accepted OWCP's administrative interpretation, but in Collier, Nicklos Drilling, and Burger we rejected this interpretation.

In support of its position, the OWCP points out that section 33's purpose is to allow a person entitled to LHWCA benefits to receive those benefits and still pursue civil remedies against third persons. According to the OWCP, the predecessor to section 33 required an election of remedies and often caused severe financial hardship to individuals who chose to pursue civil action and

forego LHWCA benefits. OWCP argues that to alleviate this hardship Congress expressly eliminated election of remedies by enacting section 33 (a). Extending this argument, OWCP maintains that financial hardship can be avoided only by paying benefits during the pendency of a civil action; thus, settlements require prior written approval only if the employer or its carrier is actually paying benefits. The actual payment of benefits, according to OWCP, is the price which Congress intended employers to pay for the right of prior approval.

Second, OWCP maintains that section 33(g)(2) can be given complete meaning only if we accept OWCP's administrative interpretation. For convenience, we set out the relevant portions of section 33

here:

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employee is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(g) Compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less

than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer nd the employer's carrier, before the settlement is executed, and by the person entitled tc compensation (or the person's representative).

The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the

employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. Section 933(1988). OWCP argues that the language following the disjunctive "or" in section 33(g)(2) would be rendered partially meaningless if prior written approval of all settlements were always required, because the alternative of merely notifying the employer of such a settlement would have no function.

We begin our consideration of OWCP's

position by noting the Supreme Court's guidance in cases involving administrative interpretations.

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an adminis-

trative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed. 2d 694 (1984) (footnotes omitted).

More recent, and more closely in factual point, is the Court's decision in Demarest v. Manspeaker, --U.S.--, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991), where the Court unanimously declined to give effect to a "longstanding administrative construction" in the face of clear statutory language granting witness fees to incarcerated state prisoners who testify

in federal court proceedings.

The Court of Appeals, while agreeing that the statutory analysis outlined above was "(o)n its face...an appealing argument," 884 F.2d (1343) at 1345 (10th Cir.1989), relied on longstanding administrative construction of the statute denying attendance fees to prisoners, and two Court of Appeals decisions to the same effect, followed by congressional revision of the statute in 1984.

But administrative interpretation of a statute contrary to language as plain as we find her is not entitled to deference. See Public Employees Retirement System of Ohio v. Betts, 492 U.S.158 [109 S.Ct. 2854, 10 L.Ed.2d 134] (1989). There is no indication that Congress was aware of the administrative

construction, or of the appellate decision at the time it revised the statute. Where the law is plain, subsequent re-enactment does not constitute an adoption of a previous administrative construction. Leary v. United States, 395 U.S. 6,24-25 [89 S.Ct. 1532, 1541-42, 23 L.Ed.2d 57] (1969).

When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances.... We cannot say that the payment of witness fees to prisoners is so bizarre that Congress "could not have intended" it. [Quoting Griffin v. Oceanic Contractors, Inc., 458 U.S.564, 575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973 (1982)].

--U.S. at --, 111 S.Ct. at 603-04

(footnote omitted).

As Collier, Nicklos Drilling, and Barger-our three most recent and only published opinions-demonstrate, we believe that the words of section 33 are unambiguous and therefore foreclose OWCP's contrary administrative interpretation. Yet, OWCP has raised two arguments that, if true, would introduce ambiguity concerning the congressional intent underlying section 33.

Turning to OWCP's first argument, we are unpersuaded that congressional desire to eliminate the financial hardship attendant on election of remedies necessitates an exception to section 33's approval requirement. First, the language of section 33 provides no exception to its approval requirement.

Second, section 33(g)(2) does expressly provide that LHWCA benefits "shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter". 33 U.S.C. Section 933 (g)(2) (1988) (emphasis added). This language squarely refutes OWCP's contention that Congress intended the actual payment of benefits to be a tradeoff for the right of prior approval. Third, OWCP's reading of section 33 is not necessary to prevent financial hardship to persons pursuing civil remedies. Section 33(a) expressly provides that persons entitled to LHWCA benefits need not make an election of remedies; rather, they may receive the LHWCA benefits while simultaneously

pursuing the civil remedy. To the extent that LHWCA claimants may choose to ignore their rights and responsibilities under section 33, Congress did not and cannot have intended to guard against such self-inflicted hardship.

We are also unpersuaded that OWCP's administrative interpretation is necessary to give meaning to the phrase "or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person." 33 U.S.C. Section 933(g)(2) (1988). While superficially persuasive, OWCP's argument does not stand careful scrutiny. First, the quoted phrase is necessary because it extends the notification requirement to judgments. Second, the quoted phrase requires that

the claimant notify the employer of any settlement or judgment whatever. As we note above, prior written approval is required only if, as Section 33(g)(1) provides, the amount of the settlement is "less than the compensation to which the [claimant] would be entitled under this chapter." Congress intended to require prior written approval in the limited circumstance where a claimant settles for an amount smaller than his LHWCA compensation entitlement. By contrast, only notification is required when a claimant receives a judgment or settles for an amount exceeding his LHWCA compensation entitlement. Congress's schemes of approval and notification dovetail perfectly; there is no ambiguity.

Conclusion

After carefully considering the permissibility of OWCP's administrative interpretation in light of the plain language of section 33, we conclude that Congress has spoken unambiguously and so as to leave no room for such embroidery. We therefore hold, in accord with the clear terms of the statute, that section 33's prior written approval requirement applies regardless of whether the employer or its carrier is paying LHWCA benefits at the time of settlement. By Chevron, there it ends. Accordingly, we AFFIRM our decision in Nicklos Drilling, AFFIRM our decision in Barger, and OVERRULE our earlier, unpublished decision in Kahny.

POLITZ, Circuit Judge, with whom KING and JOHNSON, Circuit Judges, join, dissenting.

I respectfully dissent. In 1984, as a member of an oral argument panel I authored the unpublished opinion in Kahny v. Arrow Contractors, 759 F.2d 777 (5th Cir.1984), (aff'd mem), in which we accepted the interpretation of the Director of the Office of Workers Compensation Programs, that the phrase "person entitled to compensation" as used in 33 U.S.C. Section 933(g) meant a person either receiving compensation benefits or the beneficiary of an ALJ award. I then considered such to be a proper interpretation of that statutory phrase; I am of the same opinion still.

The Director of the OWCP has so

interpreted the phrase in an untold number of cases. In his briefs the Director has detailed the reasoning behind the interpretation, including the statutory and legislative history of the parent legislation pertinent to the phrase. The Director advises that his conclusion is based not only upon that statutory and legislative history, but is informed by years of practical experience in administering the Longshore and Harbor Workers Act in many thousands of cases.

The majority rejects the Director's interpretation out of hand. I am not disposed to do so. Deference must be more than lip service. Deference presupposes deferring when one disagrees, otherwise there is no deference.

In this circuit we have recognized,

both en banc and in panels, that the construction placed on the Act by the Director is to be given the deference we are constrained to give an administrative agency. See, e.g., Boudreaux v. American Workover, 680 F.2d 1034, 1046 n. 23 (5th Cir.1982) (en banc); Alford v. American Bridge, 642 F.2d 807, 809 n. 2 (5th Cir. 1981).

I view the Director's construction of the subject phrase to be a reasonable one, given the statutory and legislative history of the Act. Early on a person injured on the job had to elect either to proceed under the Act or to seek recovery in tort. Congress deemed this too harsh and eliminated the election requirement. In its place it placed the consent and, later, notice requirements in the Act.

Both have a place in a comprehensive scheme which I perceive as just to all concerned. One need not elect but simultaneously may proceed in comp against the employer, while proceeding in tort against a responsible third party. If one does the latter and is receiving comp benefits from the former one must secure the employer's consent to settle if one is to preserve the right to receive comp payments in excess of the tort settlement. That is totally appropriate and fair because the employer is entitled to a credit for the sums recovered in tort in the instance of a job-related injury caused by a tortiously acting third person. But the requirement is not absolute.

Assume a not infrequent occurrence.

The employer denies owing compensation and refuses to pay. The employee seeks tort recovery from a third party. A settlement is offered. Why must the employee, who was denied comp, go hat in hand to the employer and request permission to settle his claim? Why should he? This query is not simply erecting a straw man. In one of the consolidated cases, Barger, we find the anomaly of the employer defensing a Jones Act claim by Barger's survivor by formally judicially claiming that it owed only LHWCA comp payments for Barger's accidental death, and then defensing the subsequent comp claim by insisting that the survivor had forfeited her comp claim because she did not get the employer's approval to settle the tort claim against a third-party tort

feasor.

I agree with the Director's long-standing construction that it is not reasonable to require an employee to secure the approval of the employer before making a tort settlement if the employer has declined to pay comp benefits. I can conceive of no valid purpose to be served by requiring otherwise other than to serve as the basis for forfeiture of a legitimate comp claim by an injured worker or the survivors of a deceased worker. The parties argue that the statute was amended to overrule the Director's erroneous interpretation. If that were so one would expect some small reference to such in the legislative history. There is none. There is no acceptable explanation offered for the

absence of such.

In 1984 the provision containing the phrase at issue was reenacted without change. Surely that ought to be some indication that the universal construction given the phrase by the Director, multiple ALJs, the Benefits Review Board, and several courts has received congressional approval. I am so persuaded.

Finally, the provision for notice added in 1984, section 933(g)(2) adds to the force of the Director's construction. The Act first provides for approval of the employer if comp is being paid. In the notice provision the Act goes on to require notification of a settlement or judgment, <u>whether comp is being paid or not</u>. To me this latter is to alert the employer and comp carrier of the

existence of an offset against any comp entitlement. It is a reasonable requirement to prevent double recovery. Nothing more.

I am convinced that the Director's interpretation in this instance is reasonable and I therefore respectfully dissent.

NICKLOS DRILLING COMPANY and
Compass Insurance Company
Petitioners

v.

Floyd COWART and Director, Office of
Workers' Compensation Programs, U.S.
Department of Labor, Respondents.

No. 89-4944
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Aug. 9, 1990.

Injured worker sought additional Longshore and Harbor Workers' Compensation Act (LHWCA) benefits. The Benefits Review Board affirmed the administrative law judge's award in favor of the employee, and appeal was taken. The Court of Appeals held that future LHWCA benefits must be denied employee who fails to obtain prior consent by

employer/carrier to settlement of his claim against third-party tort-feasor.

Vacated and remanded.

Petition for Review of a Decision and Order of The Benefits Review Board, U.S. Department of Labor.

Before GEE, DAVIS, and JONES, Circuit Judges.

PER CURIAM:

Today we reverse a decision of the Benefits Review Board as contrary to the unambiguous language of the Longshore and Harbor Workers' Compensation Act (LHWCA) and to what we had thought was the clear mandate of this Court. Because the Benefits Review Board (BRB) has refused to heed Congress's and our earlier beyond peradventure. We have in the past consistently held, and we now reaffirm,

that future LHWCA benefits must be denied an employee who fails to cbtain prior consent by his employer/carrier to the settlement of his claim against a third party tortfeasor. There are no exceptions to this rule: Congress enacted none, we engraft none, and we will tolerate the engraftment of none by the BRB in cases within our appellate jurisdiction.

FACTS and PRIOR PROCEEDINGS

Floyd Cowart was injured on July 20, 1983, on a Nicklos Drilling Company drilling right. The right was on a fixed offshore platform being operated by Transco Exploration Company. Mr. Cowart made a claim against NIcklos and its carrier for benefits under the LHWCA and filed suit against TRansco in Federal

District Court, seeking compensation for his injury. The carrier paid Cowart benefits for temporary total disability until May 21, 1984, when he was released to return to work. On July 1, 1985, without the written approval of Nicklos or its carrier, Cowart settled his third party claim against Ransco for a lump sum payment of $45,000.00

Thereafter, Cowart filed this claim against Nicklos and its carrier seeking additional LHWCA compensation. Nicklos and the carrier resisted, arguing that Cowart's failure to obtain their written approval to the settlement barred his recovery of additional LHWCA benefits. a The ALJ ruled in favor of Cowart, awarding him the difference between the amount prescribed by the Act for

permanent partial disability and the amount of the settlement. The Benefits Review Board affirmed. We reverse.

Discussion

The relevant section of the Longshore and Harbor Workers' Compensation Act provides as follows:

§ 933. Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

* * * * * * * *

(g) compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) this section only if written approval the settlement is obtained from employer and the employer's carrier before the settlement is executed, a by the person entitled to compensation (or the person's representative). The approval shall be

made on a form provided by the Secretary and shall be filed by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer andy settlement obtained from or judgment rendered against a third person all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether employer or the employer's insurer made payments or acknowledged entitlement to benefits under this circuit.

33 U.S.C. § 933 (emphasis added).

The underlined portion of the

above-quoted statute requires, in set terms and with qualification, exception or limitation, the person entitled to compensation obtain written approval both from his employer and from the employer's insurance carrier before entering into a settlement with a third person. A failure to comply with this requirement results in the forfeiture of their benefits under the LHWCA, in all cases.

We have faced this issue in the past, and we are convinced that we resolved it properly. In Petroleum-Helicopters, Inc. v. Collier we made clear that § 933's requirement that an employee and carrier for any settlement with a third party tortfeasor is "unqualified", and we declined to read into it a "waiver of subrogation"

exception. Petroleum Helicopters, Inc. v. Collier, 784, F.2d 644, 647 (5th Cir. 1986).

So that the BRB can be guided in its future decisions, and because we do not wish to again revisit the issue, we hold that there are no exceptions whatever to the "unqualified" language of § 933. Rather, "the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier ..." 33 U.S.C. § 933(g)(1) (emphasis added). In this instance "only" means "only" and, absent any room for interpretation or construction, we give it its intended meaning. Should Congress wish to give it another, it need only say so.

According, the Decision and Order of the Benefits Review Board is VACATED and this matter is REMANDED to the Administrative Law Judge for the entry of an order consistent with this opinion.

BRB No. 87-330

FLOYD COWART)
Claimant-Respondent)
)
v.)
)
NICKLOS DRILLING COMPANY)
)
and)
)
COMPASS INSURANCE COMPANY)
Employer/Carrier)
Petitioners)

DECISION AND ORDER

Appeal of the Decision and Order, the Order on Petition for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees of Parlen L. McKenna, Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz (Seelig, Cosse, Frischhertz and Poulliard), New Orleans, Louisiana, for Claimant.

H. Lee Lewis, Jr. (Ross, Griggs & Harrison), Houston, Texas, for employer/carrier

Before: SMITH, Acting Chief Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order, the Order on Petition for Reconsideration and the Supplemental Decision and Order Awarding Attorney's Fees (85-LHC-2125) of Administrative Law Judge Parlen L. McKenna rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. Section 901, et seq., as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. Section 1331, et seq., (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are supported by substantial evidence, are rational and are in accordance with law. 33 U.S.C. Section 921(b)(3); O'Keeffe v. Smith,

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant was injured in the course of his employment on July 20, 1983, while working on a fixed platform operated by Transco Exploration Company. Claimant suffered injuries to his right hand and lost the distal half of his right thumb as a result of this incident. Claimant was off work from July 21, 1983 to May 21, 1984, when he was released to return to work with employer with a 40 percent permanent partial disability based on the loss of use of his right hand and thumb. Employer paid claimant temporary total disability benefits during this period. 33 U.S.C. Section 908(b). However it refused to pay claimant permanent partial disability benefits upon his return to

work. Claimant filed a civil suit in the United States District Court for the Eastern District of Louisiana, alleging that Transco, the third party and owner of the platform, was responsible for his injuries. Prior to trial, a settlement was reached between Transco and claimant on July 1, 1985 in which Transco agreed to pay claimant a lump sum of $45,000. Employer did not give its written approval of this settlement, but it did have notice of the settlement. Claimant subsequently filed this claim under the Act for a schedule award of permanent partial disability benefits based on the injuries to his right hand and thumb. Employer contended below that because it did not give written approval to claimant prior to the third party settlement,

claimant is barred under Section 33(g), 33 U.S.C. Section 933(g), from receiving any future compensation.

The administrative law judge found that Section 33(g) did not bar claimant's right to compensation under the Act. The administrative law judge noted that in Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir.1986), rev'g 17 BRBS (1985), the United States Court of Appeals for the Fifth Circuit held that the failure by an injured employee to obtain employer's prior consent to settlement of the employee's claim against a third party tortfeasor bars the employee's right to future benefits under the Act, including situations where the employer has contractually waived its subrogation rights

against the third party tortfeasor. The administrative law judge stated, however, that the court in Collier made no decision regarding what would occur where benefits were not being voluntarily paid by employer at the time of settlement, i.e., where one is not a "person entitled to compensation" under the Act. The administrative law judge noted that in O'Leary v. Southeast Stevedoring Co., 18 BRBS 25 (1986), the Board indicated that it is only in situations where employer is paying compensation either voluntarily or pursuant to an award that claimant is are required to obtain prior written consent for its third party settlement. The administrative law judge concluded that since in the instant case claimant was not receiving compensation from

employer at the time of settlement he was not a person entitled to compensation under Section 33(g)(1) of the amended Act and that employer's prior written approval was not required. 33 U.S.C. 933(g)(1)(Supp. V 1987). The administrative law judge further found that Section 33(g)(2), 33 U.S.C. Section 933(g)(2) (Supp.V 1987) did not bar the claim, as employer had notice of the settlement before it was effected. The administrative law judge therefore ordered employer to pay claimant permanent partial disability benefits of $6,242.17, or the difference between the amount of his past due compensation, $35,592.77, and his net recovery from the third party settlement, $29,350.60. 33 U.S.C. Section 907, ordered employer to

pay claimant interest in accordance with 28 U.S.C. Section 1961 on all past due benefits, and authorized claimant's counsel to submit a petition for an attorney's fee.

Following the issuance of the administrative law judge's Decision and Order, employer submitted a Motion for Recusal and Petition for Reconsideration of the administrative law judge's Decision and Order. (1) Regarding the petition for reconsideration, the administrative law judge reiterated his finding in his original Decision and Order, i.e., that since claimant was not a "person entitled to compensation", Section 33(g)(1) does not bar his right to compensation under the Act. Moreover, the administrative law judge

rejected employer's contention that he raised the issue of claimant's entitlement to future medical benefits sua sponte, thus causing prejudice to employer and violating its procedural due process rights, concluding that he had properly addressed the issue of future medical benefits. Lastly, the administrative law judge reaffirmed his findings granting interest and claimant's entitlement to an attorney's fee award. Claimant's counsel subsequently was awarded an attorney's fee of $4,125.74.

On appeal, employer contests the administrative law judge's findings with regard to Section 33(g), medical benefits, interest, and attorney's fees. Claimant responds, urging affirmance.

I. Section 33(g)

Employer contends that the administrative law judge's finding that Section 33(g) does not bar claimant's right to future compensation runs contrary to the Fifth Circuit's holding in Collier, supra. Employer challenges the administrative law judge's reliance on the fact that claimant was not a "person entitled to compensation", i.e., receiving voluntary payments at the time of settlement. Employer contends that the Fifth Circuit in Collier imposed an absolute requirement for written approval of third party settlements, and did not mention anything pertaining to a "person entitled to compensation". Employer further asserts that Collier involved a situation, like that in the instant case,

where the two employers had a contract containing an agreement to waive subrogation and to indemnify the potential third party tortfeasor. Finally, employer contends, the Fifth Circuit in Collier reviewed the changes made by the 1984 Amendments to Section 33(g) and concluded that the Act allows no exceptions to the written approval requirement.

We reject employer's contentions, as we agree with the administrative law judge that Collier may be distinguished from the instant case. In Collier, the claimant was receiving voluntary payments of compensation from the employer for injuries sustained in a work-related accident. Claimant sued a third party tortfeasor in Federal District Court, but settled this suit without the approval of

the employer or its carrier. The employer subsequently terminated its compensation payments. Claimant sought to have his disability benefits resumed, and the employer countered that claimant's failure to obtain its consent to the settlement eliminated its compensation liability. The administrative law judge rejected this contention, and the Board affirmed, agreeing with claimant that the employer's approval of the settlement was unnecessary as the employer had contractually waived all rights of subrogation against the third party. The Board also stated that Section 33(g) does not apply in cases where the employer waives its subrogation rights against a third party. Collier v. Petroleum Helicopters, Inc., 17 BRBS 80 (1985).

The employer appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit, which reversed the Board's decision. Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir. 1986). The court framed the narrow issue before it as follows:

(D)oes the failure of an injured employee to obtain the prior consent of the employer/carrier to settlement of the employee's claim against a third party tortfeasor bar the employee's right to future benefits under the LHWCA when the employer/carrier has contractually waived their subrogation rights against the third party tortfeasor?

Collier, 784 F.2d at 645, 18 BRBS at 68 (CRT). The court held that although one

of the employer's interests in the settlement, that of recoupment of compensation benefits from the settlement proceeds, was absent under these circumstances, the employer retained an interest in the amount of its statutory offset under Section 33(f), 33 U.S.C. Section 933(f); therefore, claimant's failure to obtain the employer's prior written consent under Section 33(g) barred claimant's right to further compensation. Id., 784 F.2d at 646-647, 18 BRBS at 71 (CRT). See also Pinell v. Patterson Service, 22 BRBS 61 (1989).

As the administrative law judge found, the instant case is not factually similar to Collier, and the legal issues are not the same. Although, as in Collier, employer and Transco had a

waiver of subrogation agreement in this case, no one contends that fact renders Section 33(g) inapplicable. As the subrogation agreement, and that issue is not present here. Moreover, in Collier, employer voluntarily paid benefits at the time of the third party settlement. Thus, there was no dispute that Section 33(g) in 1984 with the addition of Section 33(g)(1) applied unless the waiver of subrogation agreement rendered it inapplicable. The changes made in Section 33(g) in 1984 with the addition of Section 33(g)(2) and their effects on claimants who were not paid benefits voluntarily or pursuant to an award were not before the court. (2)

Prior to the 1984 Amendments, the Board held that a claimant was a "person

entitled to compensation" within the meaning of Section 33(g), 33 U.S.C. Section 933(g)(1982) (amended 1984), if employer was paying benefits either voluntarily or pursuant to an award at the time of the third party settlement. See O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977), aff'd mem., 622 F.2d 595 (9th Cir. 1980). If claimant was not receiving benefits, Section 33(g) did not apply. See Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982), aff'd mem., 729 F.2d 777 (5th Cir. 1984). At that time, Congress added Section 33(g)(2), which provides:

> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment

> rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.
>
> 33 U.S.C. Section 933 (g)(2)(Supp. V 1987).

In Dorsey v. Cooper Stevedoring Co., Inc., 18 BRBS 25 (1986), the Board addressed the effect of the addition of Section 33(g)(2) on claimants who were not receiving any benefits at the time of a third party settlement. This section clearly applies regardless of whether employer has made any payments to claimant. However, it applies if no written approval is obtained as discussed in subsection (g)(1) or if the employee fails to notify the employer of any

settlement or judgment in a third party action. In Dorsey, in order to give effect to all parts of the statute, the Board concluded that where claimant is not a "person entitled to compensation," he is required to either obtain written approval or notify employer of the third party settlement. See also Chavez v. Todd Shipyards Corp., 21 BRBS 272 (1988); Mobley v. Bethlehem Steel Corp., 20 BRBS 239 (1988). This construction of the statute protects employer's Section 33(f) lien interest by requiring that claimant, at a minimum, provide employer with notice of any settlement or judgment. See Mobley, supra.

As employer contends, the court's opinion in Collier contains language to the effect that there is no exception to

the written approval requirement of Section 33(g)(1). The court in Collier, however, did not address the case where claimant is not a "person entitled to compensation" or the notice provision of Section 33(g)(2). Under these circumstances, the administrative law judge found that employer had notice of the settlement at least three months before it was consummated. Accordingly, as the administrative law judge's finding that Section 33(g) does not bar claimant's entitlement to benefits is rational, supported by substantial evidence and is in accordance with law, we affirm his finding.

II. Interest

Employer contends that the administrative law judge's award of

interest on past due compensation payments runs contrary to 28 U.S.C. Section 1961, which it claims only allows interest to be paid on money judgments in civil cases in District Court. We reject this contention. While there is no provision in the Act providing for payment of interest on unpaid installments of compensation, the Board has held that interest awards are consistent with the congressional purpose of making claimants whole for their injuries. Santos v. General Dynamics Corp., 22 BRBS 226 (1989); Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984), modified on reconsideration, 17 BRBS 20 (1985). The Board relied on Section 1961 in Grant as guidance in establishing an appropriate rate of

interest. We therefore reject employer's contention that Section 1961 is not applicable to administrative tribunals, and we affirm the administrative law judge's award of interest on past due compensation.

III. Medical Benefits

Employer contends that the administrative law judge's award of future medical benefits was not based on the evidence contained in the record, and was raised sua sponte by the administrative law judge. Employer contends that it had insufficient opportunity to respond to the administrative law judge's order of May 14, 1986, in which he found that the issue of future medical benefits should be included for consideration in the

instant case, and that claimant submitted his brief without providing a copy of a certificate of service to employer.

We reject employer's argument. As the administrative law judge noted in his order on Petition for Reconsideration, he is permitted pursuant to 20 C.F.R. Section 702.336(a) (3) to include new evidence or issues not raised in the parties' pleadings, provided the parties are provided with fair notice. See Cornell University v. Velez, 856 F.2d 402, 21 BRBS 155 (CRT) (1st Cir. 1988). The administrative law judge noted in his Order on Petition for Reconsideration that claimant had initially raised the issue of his entitlement to future medical benefits at the hearing and had expressed his concern that such benefits

might not be forthcoming. The administrative law judge then issued an order in which he stated that although no discussion regarding the issue of future medical benefits was held at the hearing, and was not raised in the pleadings, he would consider the issue in view of claimant's "strong feelings" on the subject. (4) Order at 3-4. The administrative law judge then directed the parties to submit briefs addressing this issue within 30 days, and gave employer ten days to submit additional evidence in opposition to the grant of future medical benefits and to indicate whether it wanted an additional oral evidentiary hearing regarding the matter. As employer had an opportunity to address the issues, availed itself of this

opportunity and submitted a brief, its due process rights were not violated. Further, and administrative law judge can award future medical benefits for a work-related injury, but the services ultimately provided must be reasonable and necessary for the work-related injury. 33 U.S.C. Section 907; see generally Winston v. Ingalls Shipbuilding Inc., 16 BRBS 1007, rev'd on other grounds, 682 F.2d 968 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146 (1982). At such time when claimant applies for future medical expenses, employer may object to such treatment as the issue arises. We therefore affirm the administrative law judge's award of future medical benefits.

IV. Attorney's Fee

Employer lastly contends that the administrative law judge erred in awarding claimant's counsel an attorney's fee because it did not receive a copy of the fee petition. Employer also raises specific objections to itemizations in the fee petition. The administrative law judge awarded claimant's counsel an attorney's fee of $4,125.74 in his Supplemental Decision and Order Awarding Attorney's Fees. Employer objected to this award, however, alleging that it never received a copy of claimant's fee petition and was therefore unable to contest the award. The administrative law judge thereafter issued an Order Staying Attorney's Fees, in which he allowed employer an opportunity to review

claimant's fee petition and to make objections. However, the administrative law judge has not issued his final decision on the award of an attorney's fee and employer raises specific objections to the award before the Board.

Accordingly, the Decision and Order and the Order on Petition for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

Dated this 31st

day of October 1989

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(1) The administrative law judge denied employer's motion for recusal finding that it was without merit. Employer does not contest the administrative law judge's denial of its motion.

(2) The amended version of Section 33(g) applies to this case as it was filed after or pending on September 28, 1984, the effective date of the Longshore and Harbor Workers' Compensation Act Amendments of 1984. 1984 Amendments, Pub. L. No. 98-426, 98 Stat. 1639, 1655, Section 28(a).

(3) Section 702.336(a), 20 C.F.R. Section 702.336(a) states:

If, during the course of the formal hearing the evidence presented warrants consideration of an issue or issues not previously considered the hearing may be expanded to include the new issue. If in the opinion of the administrative law judge the new issue requires additional time for preparation, the parties shall be given a reasonable time within which

to prepare for it.

(4) The administrative law judge also noted that a conference call was held in which he informed the parties that he would subsequently issue and order regarding the matter.

In the Matter of

FLOYD COWART, Claimant	)	Case No. 85-LHC-2125
versus	)	
NICKLOS DRILLING COMPANY, Employer	)	OWCP No. 8-77392
COMPASS INSURANCE COMPANY, Carrier	)	

Doulgas M. Moragas,
Esquire For the Claimant

H. Lee Lewis, Jr.,
Esquire For the Employer/Carrier

Before: PARLEN L. McKENNA
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. (The Act), and the governing regulations thereunder, as extended to

cover certain employees under the Outer Continental Shelf Lands Act, 675 Stat. 462, 43 U.S.C. 1331 et seq. The claim was filed by Floyd Cowart, Claimant, against Nicklos Drilling Company, Employer, and Compass Insurance Company, Carrier. On July 18, 1985, this matter was referred for a formal hearing to the Office of Administrative Law Judges. The hearing was held in New Orleans, Louisiana, on April 29, 1986. Claimant's exhibits numbered 1 through 6 and Joint exhibit number 1 were admitted into evidence without objection.

During the hearing in this matter, questions were raised as to whether the Fifth Circuit's decision in Petroleum Helicopter, Inc., et al v. Collier, No. 85-4321 (March 10, 1986), barred the

Claimant's cause of action under Section 33(g) of the Act. The Employer's counsel took the position that since the Claimant had settled his third-party suit without the written consent of the Employer, a claim for compensation benefits is barred under the Longshore Harbor Workers' Compensation Act.

33 U.S.C. 901 et seq. Claimant's counsel indicated that absent a bar because of the third-party settlement, Mr. Cowart would have been entitled to $35,392.77 as a scheduled injury. Mr. Cowart's gross third party recover while amounting to $45,000.00 only netted him $29,350.60, after the deduction of attorney's fees and expenses. Thus, absent a bar, Mr. Cowart would have been entitled to $6,242.17 plus future medical

benefits if he prevailed in this case. Since neither party had anything further to present, the hearing was adjourned.

Issues

On May 14, 1986, the undersigned issued an Order directing the parties to submit briefs addressing the following issues within 30 days from the date of issuance of the Order:

(1) Whether the Claimant waived his right to permanent partial disability benefits under Section 8(c)(6) of the Act and to future medical benefits by settling a related third-party lawsuit without his employer's written consent; and

(2) Whether the Fifth Circuit's decision in Petroleum Helicopter, Inc., et al v. Collier, No. 85-4321 (March 10,

1986), overruled the Benefit Review Board's decisions in Dorsey v. Cooper Stevedoring Co., Inc., 18 BRBS 25 (1986), and O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977), aff'd mem., 611 F.2d 595 (9th Cir. 1980).

Consequently, these unresolved issues will be addressed in this Decision and Order.

Stipulations

At the outset of the hearing, the parties stipulated, and I so find:

1. That the parties are subject to the Act;

2. That Claimant and Employer were in an employee/employer relationship at the time of the injury;

3. That Claimant was injured on July 20, 1983.

4. That Claimant was in the course and scope of his employment;

5. That Claimant gave timely notice of the injury to Employer;

6. That Claimant filed a timely claim for compensation;

7. That Employer filed a timely notice of controversion of the claim;

8. That compensation benefits were paid to Claimant for temporary total disability from July 21, 1983 to May 30, 1984, at a rate of $364.68 per week for a total of $16,775.28 to date of hearing;

9. That Claimant's average weekly wage was $547.00;

10. That Claimant is now permanently partially disabled (40% to his hand);

11. That all medical benefits have been paid; and,

12. That at the time of the injury there was in effect a Platform Drilling Contract which provided for an agreement to hold harmless, waiver of subrogation and indemnification between the parties and those provisions were adhered to by the parties.

Facts

Claimant, a motorman, was employed by Nicklos Drilling Company, and at the time of the accident, was working on a fixed platform owned and Transco Exploration Company (Transco). On July 20, 1983, Claimant was laboring on Rig #81, located on the Outer Continental Shelf, when he sustained injuries to his right hand, when a mud tank crushed his hand during movement of the tank by a crane. Claimant also lost the distal half of his

thumb as a result of the accident. Following his injury, Claimant was treated by a series of physicians, including Frank X. Cline, Jr., M.D., an orthopaedic surgeon of Monroe, Louisiana. Claimant reached maximum medical improvement on May 21, 1984. At that time, Dr. Cline released Claimant to return to employment and assessed a 40% permanent partial disability based on the loss of the distal half of his thumb and residual synovitis in the flexor tendons.

Employer and its Carrier paid Claimant temporary total disability from July 21, 1983 through May 21, 1984, at the rate of $346.68 per week for a total of $16,775.28. Since Claimant had a scheduled injury under Section 8(c)(6) of the Act, once he reached maximum medical

improvement he was automatically entitled to 66 2/3 of his average weekly wage of $542.00 for a period of 75 weeks commencing May 22, 1984. The Department of Labor recommended Employer/Carrier to pay Claimant compensation based on his permanent partial disability rating. The record indicates that Employer/Carrier never made such payments. Finally, on April 22, 1985, the Deputy Commissioner corresponded to the Carrier noting that compensation in the amount of $35,592.77 plus 10% penalties and interest was due to the Claimant. Claimant filed suit in the United States District Court for the Eastern District of the Louisiana against Transco, the third party and owner of the rig, for its negligence in causing the accident. On July 1, 1985, Claimant

confected a settlement with Transco for $45,000.00 of which he netted $29,350.60 after the deduction of attorney's fees and expenses. Employer/Carrier did not give written approval of the settlement but had notice of the settlement, as is indicated by the record.

The findings of fact and conclusions of law which follow are prepared upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law.

Findings of Fact and Conclusions of Law

The threshold question to be resolved is whether Section 33(g) bars the Claimant's entitlement to (1) permanent partial disability and (2) future medical benefits. Fundamental to the first question is whether the Fifth Circuit's

decision in Collier, supra, overruled the Benefits Review Board decision in the Dorsey and O'Leary, supra. Claimant argues that Section 33(g) does not bar his recovery to compensation and future medical benefits pursuant to the Board's decisions in Dorsey and O'Leary, supra. Claimant argues that he is only required to obtain written approval from the Employer if he is receiving compensation. Since he was entitled to receive compensation for his scheduled injury after reaching maximum medical improvement, but the Employer withheld such compensation, he had no obligation to give written notice of the settlement to the Employer, relying on Dorsey's Section 33(g)(2) exception to the written notice requirement. (Also, see O'Leary,

supra).

On the other hand, the Employer/Carrier contend that since Claimant did not secure written approval of the third party settlement pursuant to Section 33(g) of the Act, he is barred from entitlement to $6,242.17, the difference between his net recovery and the outstanding compensation still due and from a right to future medical benefits. Relying on Collier, supra, the Employer/Carrier contend that both Sections 33(g)(1) and 33(g)(2) mandate that written approval be secured from the Employer. The Employer/Carrier further contend that there is no exception to the written approval requirement as suggested in Dorsey, supra.

If I find that the Employer/Carrier

position is correct, then the Claimant is barred from recovering compensation and future medical benefits. Accordingly, a determination, must be made regarding whether the Fifth Circuit in Collier intended to overrule the Board's decision in Dorsey.

In Collier, the Fifth Circuit began the opinion by noting that the question they had to answer was a narrow one: "does the failure by an injured employee to obtain the prior consent of the employer/carrier to settlement of the employee's claim against a third party tortfeasor bar the employee's right to future benefits under LHWCA when the employer/carrier has contractually waived their subrogation rights against the third party tortfeasor." After careful

examination of Section 33(g), the Fifth Circuit held, in pertinent part:

> There is nothing in the language of Section 933 to support a 'waiver of subrogation' exception to the unqualified requirement that an employee obtain the consent of the employer and carrier for any settlement with a third party tortfeasor. To the contrary, Section 933(g)(1) is brutally direct: 'the employer shall be liable for compensation. . . only if written approval of the settlement is obtained from the employer and the employer's carrier' (emphasis added).

Thus, the Fifth Circuit held in Collier that where an employee is a "person entitled to compensation" under the Act, nothing in Section 33(g) supports a "waiver of subrogation" exception to the unqualified requirement that an employee obtain written consent for settlement with a third party

tortfeasor. The underlying public policy rationale for that position is:

> to ensure that employer's rights are protected in a third party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. 933(b)-(f). Collier v. Petroleum Helicopters, Inc., 17 BRBS 80, 82 (1985). See also Dorsey, supra, at 27, 28.

However, the Collier decision did not rule on the issue of where benefits are not being paid, and the claimant is not a "person entitled to compensation" under the Act. Indeed, the O'Leary court, which was affirmed by the Ninth Circuit of Appeals, specially addressed and inequity of applying the presumption in a case such as the one at bar:3

The Act is clearly written with the underlying concept that the employer upon

being informed of an injury will voluntarily begin to pay compensation. See 33 U.S.C. Section 914(a). The provisions of Section 33 similarly contemplate either payments being made voluntarily or pursuant to an actual award. Section 33(g) which requires the consent of the employer to the third party settlement refers to Section 33(f) which indicates that in cases of third party settlement, the employer's liability to the claimant is for those sums in excess of that gained in the third party settlement, the very language contemplating that employer either be making voluntary payments under the Act or that it had been found liable for benefits by a judicial determination. Moreover, Section 33(b) provides:

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

This provision clearly implies an employer's rights under Section 33 derive solely from their making either voluntary payments under the Act or pursuant to an award.

Only where an employer voluntarily pays compensation or where an award is entered against the employer does it make sense to require written consent by employer to the third party settlement. To find otherwise could severely prejudice a claimant's rights.

Several reasons support this

interpretation. First, the legislative history of the 1984 Amendments indicates no congressional intent to overrule O'Leary. The 1984 Amendments did not alter the language in the 1972 Act now found in subsection (g)(1), which states that this provision only applies to a "person entitled to compensation." Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt the interpretation when it re-enacts a statute without change. Lorillard v. Pons, 434 U.S. 574, 580-81 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 N.8 (1975); NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951).

Second, this interpretation gives meaningful effect to the phrase "or if

the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person" contained in subsection 33(g)(2). In construing a statute, a judicial body is obliged to give effect, if possible, to every word Congress used. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); U. S. v. Menasche, 348 U.S. 528, 538-39 (1955). A basic rule of construction is that a statute should be interpreted so as not to render one part inoperative. Colautti v. Franklin, 439 U.S. 379, 393 (1979). If subsection (g)(2) were interpreted to require written notice regardless of whether claimant was receiving compensation at the time of the third party settlement, as employer argues, the phrase requiring notice of

any settlement of judgment would be rendered superfluous since the written approval requirement makes any additional notification unnecessary. See Colautti, supra. Under this analysis, however, claimant must give notice to employer if he is not receiving compensation. Consequently, notice along is sufficient where the claimant is not "entitled to compensation" under subsection 33(g)(1).

Finally, this conclusion that claimant need obtain written approval of a third party settlement only when he is "entitled to compensation" is consistent with policy concerns. The Act should be construed in order to further its purpose of compensating longshoremen and harbor workers "and in a way which avoid harsh and incongruous results." Voris v.

Eikel, 346 U.S. 328, 333 (1953); Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 268 (1977). If Section 33(g) was applied as employer argues, the result would be harsh and unfair. There would be no means to protect claimant against the withholding of consent by employer or its insurer in a meritorious case. In any case in which a settlement was entered into for an amount less than the compensation to which claimant would be entitled under the Act, employer would only need to withhold its written approval of the settlement thereby avoiding the payment of compensation under the Act. The purpose of Section 33(g) can be satisfied by the less restrictive approach adopted in this opinion. See Devine v. National

Creative Growth, Inc., 16 BRBS 147, 154 (1982) (Opinion of Ramsey, C.J., dissenting).

Indeed, if a claimant was injured through the negligence of a third party and the employer denied coverage under the Act, a claimant would be forced to sue the third party. However, even if the claimant obtained a reasonable settlement offer, an employer could refuse to give its consent to the third party settlement for any number of reasons, e.g., it does not wish to approve the settlement on a form provided under the Act since its consent to jurisdiction under the Act might be inferred. This could result in a claimant not being paid any compensation, yet the claimant would be afraid to make

a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money (the Act providing no procedure for waiving employer's consent unlike some state acts). Surely, Congress by requiring written consent could not have contemplated such a result. O'Leary, supra, at 147-149.

The Board's interpretation in Dorsey of the amended Section 33(g) follows:

> Employer contends that the phrase 'regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act,' inserted at the end of subsection 33(g)(2), overrules O'Leary4 and that compensation is therefore

barred in this case regardless of the timing of the settlement. We reject this contention. We do not view this new phrase in subsection 33(g)(2) as modifying the written approval requirement of subsection 33(g)(1). Rather, we view subsections 33(g)(1) and 33(g)(2) of the amended Act as separate provisions applicable to separate situations.

Under subsection 33(g)(1), the employer's written approval of a settlement must be obtained where employer is paying compensation as stated in O'Leary. Under subsection 33(g)(2), regardless of whether employer has made payments or acknowledged entitlement (i.e., where O'Leary does not apply), the employer must at a minimum be given notice of a settlement; written approval is not required. Thus, the statute as interpreted in O'Leary is re-enacted in subsection 33(g)(1), and an additional notice requirement in cases where the claimant is not 'entitled to compensation' under subsection 33(g)(1) is enacted in subsection 33(g)(2).

In this case, it is clear that at the time of the settlement with Transco,

Claimant was not receiving compensation. Therefore, Claimant was not a "person entitled to compensation" under 33(g)(1) (emphasis added). Accordingly, the provisions of 33(g)(2) are applicable to the facts of this case. Under subsection 33(g)(2), the employer/carrier must be given notice of the settlement; written approval is not required. The record indicates that the Employer/Carrier had notice of the settlement at least 3 months before it was confected. The fact that Employer/Carrier's written approval was not obtained is therefore irrelevant.

Based upon the foregoing findings of fact, conclusions of law, and the entire record, I make the following compensation Order. The specific dollar computations of the compensation award shall be

administratively performed by the Deputy Commissioner. Interest as hereinafter provided in the Order is applicable to all past due weekly installments of compensation.

ORDER

Therefore, it is the ORDER of the Administrative Law Judge that:

1. Employer/Carrier shall pay the Claimant $6,242.17, the difference between the amount of his past due compensation ($35,592.77) and his net recovery from the third party settlement ($29,350.60).

2. Employer/Carrier shall pay for all future medical benefits related to the Claimant's July 20, 1983 injury.

3. Employer/Carrier shall pay to the Claimant interest in accordance with

28 U.S.C. 1961 on all past due benefits outstanding.

4. Claimant's attorney, within 20 days of the receipt of this Order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel who shall then have 10 days to respond with objections thereto.

Dated: November 25, 1986

New Orleans, Louisiana

---

1. Under these provisions, employer is entitled to credit the proceeds of a third party settlement or judgment in a suit brought by claimant or employer, against employer's liability for compensation under the Act.

2. While the Collier decision contained language which could be construed as supporting the Employer's position, such dicta is not controlling. Moreover, there was no discussion of either the Dorsey or O'Leary cases by the Fifth Circuit in Collier. Thus, it does not follow that the Court would expand

its holding in Collier to cover the facts presented here. Under this circumstance, I am constrained to follow and fully support the Dorsey rationale.

3. The fact that Section 33(g) was subsequently amended has no affect on the legal or public policy analysis herein.

4. In O'Leary, the Board interpreted the language "person entitled to compensation" as indicating that Section 33(g) bars compensation only when employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement. See also Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982) (Ramsey, C.J., concurring in result), aff'd mem, 729 F.2d 757 (5th Cir. 1984); Caranate v. International Terminal Operating Co., 7 BRBS 248 (1977).

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 83-4104

EDNA KAHNY, (Widow of Don Kahny)
Petitioner,

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR and ARROW CONTRACTORS OF JEFFERSON, INC. and LIBERTY MUTUAL INSURANCE COMPANY,

Respondents.

No. 83-4109

ARROW CONTRACTORS OF JEFFERSON, INC. and LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR and EDNA KAHNY, Respondents.

Petitions for Review of an Order of the Benefits Review Board

---

Before POLITZ, RANDALL and JOLLY, Circuit Judges.

POLITZ, Circuit Judge:

These consolidated petitions, brought pursuant to § 21(c) of the Lonshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 921 (c), seek review of the final order of the Benefits Review Board (BRB), affirming the compensation award by an administrative law judge, in Kahny v. Arrow Contractors, Inc., 15 BRBS 212 (1982). Edna Kahny petitions for review, as does Arrow Contractors of Jefferson, Inc. and its compensation insurer, Liberty Mutual Insurance

Company. We modify the award and affirm.

FACTS

Don Kahny was accidentally killed on February 22, 1979, while working for Arrow on a fixed platform on the outer continental shelf off the coast of Louisiana. Shortly thereafter, Edna Kahny, Don Kahny's widow, filed a claim for compensation benefits under the LHWCA, as extended by the Outer continental Shelf Lands Act, 43 U.S. C. § 1333(b). At the same time, she filed a tort action against the owner of the platform and the owners of the drilling rig. Arrow controverted Edna Kahny's right to receive death benefits, contending that she id not qualify as a "widow" under § 9(b) of the LHWCA, 33

U.S.C. § 909(b). After some delay, Liberty Mutual paid Edna Kahny $1,500, in reimbursement of a portion of the funeral expenses she had incurred.

After approximately ten months, ill, unable to work, an in dire financial straits because of the loss of her husband's income, Edna Kahny authorized her attorneys to settle her tort claim for $125,000. her net recovery, after deduction of attorney's fees, was $83,333.34. Because of her financial difficulties, Edna Kahny's attorney had advanced approximately $4,000 to cover her living expenses. She repaid this loan after she received her settlement proceeds.

Twenty months after the death of Don Kahny, an ALJ heard Edna Kahny's LHWCA

claim. The threshold issue was either Edna Kahny was the "widow" of Don Kahny within the intendment of the LHWCA. The ALJ allowed Arrow and Liberty Mutual an offset of the net amount received by EDna Kahny. He also allowed a credit for the $4,000 advanced by her attorneys. On appeal, the BRB affirmed the ALJ's award in its entirety.

ASSIGNMENTS OF ERROR

Arrow and Liberty Mutual contend that the ALJ and BRB erred in finding that Edna Kahny was entitled to a widow's benefits. They further contend that the ALJ and BRB erred in rejecting their defense under § 33(g) of the Act, 33 U.S. C. § 933(g). Specifically, Arrow and Liberty Mutual maintain consent, Edna

Kahny forfeited all compensation benefits.

Edna Kahny contends that because of its unjustified refusal to pay compensation benefits, Arrow should not be allowed an offset. Alternatively, she contends that the $4,000 advanced her attorneys should not be added to the amount of her net recovery in determining the offset total.

The Director of the Office of Workers' Compensation Programs, United States Department of Labor, maintains that the Arrow has no standing to invoke the bar of § 933(g) because Arrow waived the very subrogation rights that the section is designed to protect and because Arrow indemnified the platform owner from the tort claims brought by Edna Kahny.

Although the Director recognized that our decision in Petro-Weld, Inc. v. Luke, 619 F.2d 418 (5th Circ. 19809), is binding precedent for this panel, he questions the soundness of the decision and hopes for its ultimate reconsideration.

DISCUSSION

1. Is Edna Kahny a "widow" under LHWCA?

Only a decedent's widow is entitled to receive death benefits under the LHWCA. Section 2(16) of the Act, 33 U.S.C. § 902(16), defines widow, in pertinent part, as "the decedent's wife . . . living with or dependent for support upon him . . . at the time of his . . . death; or living apart for justifiable cause . . . ."

The ALJ found that Don and Edna Kahny

were husband and wife and were living apart for justifiable cause at the time of Don Kahny's death. WE are bound to uphold the factual findings made by the ALJ if they are supported by substantial evidence in the record considered as a whole. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

The record before us abounds with support the for ALJ's findings. Edna and Don Kahny were married in 1971. They lived together in North Carolina until Labor Day 1978 when Don Kahny departed for Cameron, Louisiana to seek employment in the offshore oilfields. Edna Kahny visited her husband in October 1978, staying with him at a motel in which he was temporarily living. She then returned to North Carolina to stay with

her mother until her husband was able to secure a suitable home. In December 1978, Don Kahny found a mobile home in Port Arthur, Texas. Moving plans were made. On February 28, 1979, Don Kahny was to use a U-Haul trailer to move his wife and step-daughter, if she so chose, to their new home. Don Kahny's death aborted these plans. Between September 1978 and February 22, 1979, Don Kahny sent his wife money in amounts commensurate with his earnings, and the couple corresponded regularly by telephone and letters. The record includes no evidence of significant marital discord.

It is apparent that the ALJ's finding is supported by substantial evidence. The Kahnys' temporary physical separation

did not break the "conjugal nexus" required by Thompson vs. Lawson, 347 U.S. 334 (1954).

2. Was Edna Kahny a "person entitled to compensation?"

The second issue presented was whether Edna Kahny was a "person entitled to compensation" under 33 U.S.C. § 933(g), which provides:

> "If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such

> <u>representative at the time of or prior to such compromise</u> on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made

(emphasis added). Although it is undisputed that Kahny neither obtained Arrow Contractors' prior written approval of her out-of-court settlement nor filed the proper form with the deputy commissioner, the BRB held that § 933(g) did no bar Kahny's right to compensation because, at the time of the settlement, Arrow Contractors was making no weekly benefits payments to Kahny, either voluntarily or pursuant to an ALJ's award. In <u>O'Leary v. Southeast Stevedoring Co.</u>, 7 BRBS 144 (1977), <u>aff'd</u>

<u>mem</u>, 622 F.2d 595 (9th Cir. 1980), the BRB held tha a claimant is a "person entitled to compensation" within the meaning of § 933(g) only if at the time of the settlement the employer is making weekly benefits payments either voluntarily or pursuant to an ALJ's award. Based upon its view that "the very language [of § 933(g)] contemplate[es] the [the] employer either be making voluntary payments under the ACt of [be] found liable for benefits by a judicial determination," 7 BRBS at 148, the BRB concluded that to apply the bar of § 933(g) to a situation in which the employer is not making weekly benefits payments at the time of the settlement

> could result in a claimant not being paid any compensation, yet the claimant would be afraid to

> make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . . .
>
> 7 BRBS at 149.

We find this analysis fully consistent with the language, legislative history, and rational of § 933(g). The critical time for the determination whether on is a "person entitled to compensation" is the time of the challenged settlement. If, at that time, the employer is not making voluntary payments and no award has been ordered by an ALJ, the claimant is not a "person entitled to compensation" under § 933(g), and is not obliged to secure prior approval for a third-party tort settlement.

3. What is the effect of the payment of funeral benefits?

In the instant case Liberty Mutual reimbursed Edna Kahny $1,500.00, as required by 33 U.S. C. § 909(a), in partial payment of the funeral expenses. In the board sense, compensation includes the funeral expense allotment, but this is not the meaning of compensation eyes used in 33 U.S. C. § 933(g). Thus, there is no merit to Arrow's contention that the $1,500.00 funeral expenses draft magically converted Edna Kahny into a "person entitled to compensation" at the very time her right to receive compensation benefits was being denied by Arrow and Liberty Mutual. We are not persuaded by that legal legerdemain. Section 933(g). Section 933(g) presents

no bar to Kahny's recovery.

Having concluded that Edna Kahny was not a person entitled to compensation under § 933(g), we need not address the issue of Arrow's standing to assert the forfeiture provisions of that section. The Director maintains that since Arrow waived its subrogation rights and, further, agreed to indemnify the platform owner for any claims made by or on behalf of its employees, it should not be allowed to raise the shield of § 933(g). We defer the resolution of that question to another panel on another day.

4. Is Arrow entitled to offset the amount of Kahny's tort settlement?

Edna Kahny asserts that the BRB erred in setting off the net amount of the third-party settlement, claiming that the

waiver of subrogation rights against the platform owner precluded Arrow from reaping the benefits of the setoff provision of 33 U.S.C. § 933(f). We do not agree. That section provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b) the employer shall be required to pay as compensation under this Act, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

5. Amount of Offset:

The ALJ and BRB erred in computing the amount of offset. There is no evidence to support the allowance of a credit for the $4,000 which the attorney made available to Edna Kahny to ease the financial distress occasioned by the

death of her husband, as compounded by the failure and refusal of the employer and compensation carrier to pay timely a widow's benefits. In fact, the parties stipulated the amount of net recovery and that stipulation should have been taken as conclusive. The award is modified to delete that portion of the offset, thus allowing a total offset of $83,333.34.

The final order of the BRB, as modified herein, is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of the Claim for Compensation under the Longshoremen's and Harborworker's Compensation Act)

MARY V. O'LEARY, NO. 78-1339)

Claimant-Respondent,)

v.)

SOUTHEAST STEVEDORE COMPANY MEMO- and LIBERTY MUTUAL INSURANCE COMPANY,)

Petitioners,)

v.)

BENEFITS REVIEW BOARD, U.S. DEPARTMENT OF LABOR,)

Respondent.)

Petition to Review a Decision of the Benefits Review Board

Before: SKELTON,* Judge, and FARRIS and PREGERSON, Circuit Judges.

*The Honorable Byron G. Skelton, sitting by designation.

Southeast Stevedore Company and Liberty Mutual Insurance Company appeal the decision of the Benefits review Board awarding death benefits to Mrs. O'Leary under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. Southeast contends that because Mrs. O'Leary accepted a settlement and released her rights against Ketchikan Pulp Company, Section 33 (g) of the Longshoremen's Act, 33 U.S.C. Section 933 (g), barred her claim for the otherwise allowable death benefits. The Benefits Review Board held that Section 33(g) was not applicable for two reasons: 1) there was no final order awarding Mrs. O'Leary death benefits under the Act as the time she settled her

third party claim, and 2) prior to the settlement, Southeast had refused to voluntarily pay Mrs. O'Leary compensation pending adjudication of her claim for death benefits under the Act.

Our scope of review is limited. We will uphold the Board's interpretation of the Longshoremen's Act if those interpretations are reasonable and reflect the policy of the Act. National Steel & Shibuilding Co. v. United States Dept. of Labor, 606 F.2d 875, 880 (9th Cir. 1979).

Section 33(g) provides:

> If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as

> determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.
>
> 33 U.S.C. Section 933(g).

The Board reasoned that "the very language [of Section 33(g)] contemplat [es] that [the] employer either be making voluntary payments under the Act or that it had been found liable for benefits by a judicial determination." 7 BRBS 144, 148 (1977). The Board concluded that a different interpretation,

> could result in a claimant not being paid any compensation, yet the Claimant would be afraid to

> make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . . .
>
> 7 BRBS 144, 149 (1977).

Here, Southeast 1) never paid compensation voluntarily or pursuant to an award and 2) disclaimed any interest in Mrs. O'Leary's third party claim even though fully aware of the proposed settlement.

The dominant purpose of the Longshoremen's Act is to aid injured longshoremen and their dependents. Reed v. The Yaka, 373 U.S. 410 (1963). The Board's ruling is reasonable and furthers the underlying purpose of the Act.

Affirmed.

LEGISLATIVE HISTORY

The Bureau of the Budget has advised that there would be no objection to the submission of this legislative proposal to Congress.

Sincerely yours,

ARTHUR E. SUMMERFIELD,
Postmaster General.

HARBOR WORKERS - COMPENSATION-THIRD PARTY LIABILITY

For text of Act see p. 426

Senate Report no. 428, June 24, 1959 [To accompany H.R. 451]

House Report No. 229, Mar. 19, 1959 [To accompany H.R. 451]

The Senate Report No. 428

The Committee on Labor and Public Welfare, to whom was referred the bill (H>R. 451) to amend the Longshoremen's

and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

BACKGROUND OF THE BILL

Like other workmen's compensation laws the Longshoremen's and Harbor Workers' Compensation Act involves a relinquishment of certain legal rights by employees in return for a similar surrender of rights by employers. Employees are assured hospital and medical care and subsistence during convalescence. Employers are assured that regardless of fault their liability to an injured workman is limited under

the act. In some instances injury to an employee is caused by a third party. In such circumstances, section 33 of the act reserves to the employee the right to seek damages against the third party.

Section 5 of the Longshoremen's Act makes the statutory liability of an employer of the exclusive liability for injury to an employee arising out of employment. This section also reserves to the employee the right to recover damages against third parties causing injury.

Section 5 of the Longshoremen's Act makes the statutory liability of an employer the exclusive liability for injury to an employee arising out of employment. This section also reserves the employee the right to recover damages

against third parties causing injury.

However, in exercising his right to sue a third party for damages under section 33 of existing law, the employee must choose whether to collect the compensation to which he is entitled or to pursue the third-party suit. He may not pursue both courses.

Existing law works on hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party. His compensation under the act is certain but his chances of winning a third-party liability suit are uncertain. In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not

months or years after when he has won his lawsuit. Circumstances like these are ready made for the unscrupulous who have been known to "stake" an injured employee while pursuing a damage suit--those who, in effect, purchases an injured employee's claim for their own monetary advantage.

PURPOSE OF THE BILL

The bill as amended by the committee would revise section 33 of the act so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the act. The principle underlying the modification of the law made by this bill, is embodied in most modern State workmen's compensation law.s The committee believes that in theory and practice this

is sound approach to what has been a difficult problem. As embodied in the committee amendment, the principle would be applied with due recognition of the equities and right of all who are involved.

Although an employee could receive compensation under the act and for the same injury recover damages in a third-party suit, he would not be entitled to double compensation. The bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee received four-fifths of the amount after necessary expenses, approved by the Deputy Commissioner, and all benefits and compensation have been deducted. Thus by giving the employer a reasonable (one-fifth) share in the net

recovery an incentive is provided not to compromise a suit only for the amount of compensation but to protect the interests of the employee as much as possible.

The other major provision of the bill relates to the immunization of fellow employees against damage suits. The rational of this change in the law is that when an employee goes to work in a hazardous industry he encounters two risks. First, the risks inherent in the hazardous work and second, the risk that the might negligently hurt someone else and thereby incur a large common-law damage liability. While it is true that this provision limits an employee's rights, it would at the same time expand them by immunizing him against suits where he negligently injures a fellow

worker. It simply means that rights and liabilities arising within the "employee family" will be settled within the framework of the Longshoremen's and Harbor Workers' Compensation Act.

The bill as amended by the committee provides greater protection to injured workers and corrects defects in existing law. It carefully protects the interests of all who are involved and balances the equities. The bill as amended has the support of both labor and industry and the endorsement of both the Labor Department and the Bureau of the Budget. The views of the executive agencies are expressed in the letters which follow:

U.S. Department of Labor.
Office Of The Secretary
Washington, May 1, 1959.

Honorable Lister Hill,
Chairman, Committee on Labor and Public Welfare, U.S. Senate, Washington, D.C.

Dear Senator Hill:

This is in further response to your request for a report on H.R. 451, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable.

This bill would amend section 33 of the act, which describes the relative rights of employers and employees under the act when a third party is responsible for ran injury which is also compensable under the act. The primary purpose of the bill apparently is to eliminate the

present requirement of an immediate election either to take benefits under the act or to pursue a remedy against the third party. Under certain circumstances, it would permit acceptance of compensation benefits and an action by the employee or his representative against the third party. On the other hand, if compensation were accepted without instituting an action against the third party within the period allowed in the bill, the cause of action would be assigned to the carrier after it had given the required notice. Two-thirds of any amount recovered by the carrier in excess of its compensation liability, after the deduction of reasonable expenses, would be payable to the employee of his eligible survivors.

In general, H.R. 451 appears to follow the pattern of the New York workmen's compensation law and would make significant changes with respect to the rights and liabilities of the parties in interest. This Department would not object in principle to what seems to be the primary purpose of the bill. However, it has several features which we find objectionable, for the reasons described in the enclosed comments on H.R. 451. We are enclsoing, as a substitute for H.R. 541, suggested language to remedy these defects. Also enclosed is a Ramseyer of the Department's amendment, and an explanation of this proposal.

Time has not permitted us to determine the views of the Bureaus of the

Budget on the submission of this report.

Sincerely yours,

JAMES T. O'CONNELL,
Acting Secretary of Labor.

Executive Office Of The President,
Bureau Of The Budget,
Washington, D.C., May 22, 1959.

Honorable Lister Hill,
Chairman, Committee on Labor and Public Welfare, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: This is in reply to your letter of April 17, 1959, requesting the views of the Bureau of the Budget on H.R. 451, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable.

As an attachment to its report,

forwarded to your committee on May 1, 1959, the Department of Labor has submitted a substitute for H.R. 451 which accomplishes the major purpose of that bill while correcting certain of its features which were found to be objectionable.

The Bureau of the Budget concurs with the views of the Department of Labor and prefers enactment of the substitute bill proposed by that Department instead of H.R. 451.

Sincerely yours,

(Signed) PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

(5)

No. 91-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE ESTATE OF FLOYD COWART

Petitioner,

VERSUS

NICKLOS DRILLING COMPANY, AND
COMPASS INSURANCE COMPANY

Respondents.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

BRIEF FOR THE PETITIONER FLOYD COWART

LLOYD N. FRISCHHERTZ, ESQ.
SEELIG, COSSE, FRISCHHERTZ
& POULLIARD
1130 St. Charles Avenue
New Orleans, LA 70130
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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED FOR REVIEW

Whether a compromise by a claimant with a third party tortfeasor, without the express written approval of his employer/carrier, serves to preclude said claimant from future compensation benefits, irrespective of whether the employer/carrier knew of the compromise, and irrespective of whether the employer/carrier was either paying claimant compensation benefits, or was under judicial mandate to pay such compensation benefits, at the time of the compromise.

LIST OF PARTIES

The following are entities interested in the outcome of this case.

1. Compass Insurance Company
   (Carrier)
2. Nicklos Drilling Company
   (Employer)
3. Floyd Cowart
   (Claimant)
4. Director, Office of Workers' Compensation Programs, United States Department of Labor
5. Mr. H. Lee Lewis, Jr.,
   GRIGGS & HARRISON
   Post Office Box 4616,
   Houston, Texas, 77210-4616

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OPINIONS AND JUDGMENTS BELOW

The Decision and Order of Administrative Law Judge Parlen L. McKenna in this matter was rendered on November 25, 1986, and is published at 19 BRBS 457.

The Opinion of the Benefits Review Board was rendered on October 31, 1989, and is published at 23 BRBS 42.

The Judgment of the United States Court of Appeals for the Fifth Circuit was rendered on August 9, 1990, and is published at 907 F.2d 1552.

The Decision of The United States Court of Appeals for the Fifth Circuit to allow rehearing en banc was issued on November 6, 1990.

The Judgment of the United States Court of Appeals for the Fifth Circuit, en banc, was rendered on March 29, 1991, and is published at 927 F.2d 828.

The Decision of the United States Supreme Court to accept Writs of Certiorari, was issued on December 9, 1991.

STATEMENT OF JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit, en banc, was rendered on March 29, 1991. The Petition for Writ of Certiorari was filed within 90 days of March 29, 1991, as required by 28 U.S.C. 2101(c) and Rule 13.1 of the United State Supreme Court Rules. Jurisdiction of this Court is proper under the provisions of 28 U.S.C. 1254(1).

STATUTE INVOLVED

The statute involved in this matter is Sections 933(g)(1) and 933(g)(2) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et. seq.*, which reads in its entirety:

> (g) Compromise obtained by person entitled to compensation.
>
> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
>
> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

STATEMENT OF THE CASE

(i) Disposition below

This case arises out of a claim by Floyd Cowart for compensation benefits pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, *et. seq.* Cowart sustained an injury in the course and scope of his employment with Nicklos Drilling Company.

The matter was heard before Administrative Law Judge, Parlen L. McKenna, who entered an order on November 25, 1986, awarding Cowart benefits. 19 BRBS 457; J.A. 4. Nicklos Drilling Company appealed to the Benefits Review Board. On October 31, 1989, the Board affirmed Judge McKenna's award. 23 BRBS 42; J.A. 3.

On August 9, 1990, a three judge panel of the United States Court of Appeals for the Fifth Circuit reversed the findings of Judge McKenna as affirmed by the Board. J.A. 2. Cowart timely petitioned the Fifth Circuit for a Rehearing En Banc, which was granted on November 6, 1990. On March 31, 1991, the Fifth Circuit, ruling en banc, affirmed the panel's decision. J.A. 1. Cowart applied to this Court for certiorari, which was granted on December 9, 1991.

(ii) Statement of Facts

On July 20, 1983, Floyd Cowart suffered a crush injury to his hand during movement of a mud tank by a crane. At the time of his injury, Cowart was

working for Nicklos Drilling Company on Rig 81, a Transco Exploration Company platform located on the outer continental shelf. In addition to the crush injury, Cowart also lost the distal half of his thumb. After several months of treatment, Cowart reached maximum medical improvement on May 21, 1984. On May 25, 1984, Cowart's physician released him to return to work, assessing a forty percent partial disability rating, based on the loss of the distal half of his thumb and residual synovitis in the flexor tendons.

Immediately after his injury, Cowart made a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.* Cowart received temporary total disability benefits from July 21, 1983, the date of his accident, through May 21, 1984, the date he reached maximum medical improvement. As Cowart had sustained a schedule injury under Section 8(c)(6) of the Act, he was automatically entitled to two thirds of his average weekly wage for a seventy-five week period, commencing on the date of maximum medical improvement; May 21, 1984. While Nicklos, who acknowledged liability for these schedule benefits, was instructed by the Department of Labor to pay said benefits; Nicklos never paid these benefits to Cowart.

Meanwhile, Cowart had filed suit in the United States District Court for the Eastern District of Louisiana against Transco, the third party and owner of the rig, for its negligence in causing the accident. On July 1, 1985, more than thirteen months after the schedule payments were supposed to have begun, but before any such payments were made by Nicklos, Cowart settled his third party claim with Transco. This settlement was funded entirely by Nicklos pursuant

to an indemnification agreement between Nicklos and Transco. Thus, Nicklos not only had notice of the settlement between Cowart and Transco, but actually paid the settlement funds to Cowart.

Cowart's compensation claim under the Act proceeded to administrative hearing on November 25, 1986. Nicklos argued that Cowart forfeited his claim for compensation because Cowart failed to obtain Nicklos' *written* approval of the settlement, pursuant to Section 933(g) of the Act. Administrative Law Judge Parlen L. McKenna held that Section 933(g) did not preclude compensation benefits under the fact situation at bar; Nicklos' participation in the settlement agreement sufficed as notice under Section 933(g)(2) irrespective of the fact that Cowart had not garnered Nicklos' *written* approval. J.A. 4.

The Benefits Review Board affirmed McKenna's decision and the matter was appealed to the United States Court of Appeals for the Fifth Circuit. On August 9, 1990, a three judge panel reversed the Administrative Law Judge and the Benefits Review Board, holding:

> ". . . there are no exceptions whatever to the "unqualified" language of Section 933. Rather, "the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier. . ."
>
> J.A. 2, p. 38.

As this holding conflicted with prior precedent of the Fifth Circuit, Cowart filed a Suggestion for Rehearing En Banc which was granted on November 6, 1990. Sitting en banc, the Fifth Circuit affirmed the panel's

decision on March 31, 1991. J.A. 1. This Court granted certiorari on December 9, 1991.

SUMMARY OF ARGUMENT

The issue at bar is one of statutory interpretation, specifically, the interpretation of Section 933(g) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.* Section 933(g) enunciates the requisite notice to be given an employer any time a claimant under the Act confects a settlement with a third party.

Section 933(g), in its current form, provides for an alternative notice requirement depending on the employer's compliance with the Act. 933(g)(1) provides that a "person entitled to compensation" must garner the employer's *written* approval for any third party settlement. 933(g)(2) requires that all "employees" must give the employer *notice* of any third party settlement. The United States Court of Appeals for the Fifth Circuit has ruled that Section 933(g)(1) and Section 933(g)(2) operate redundantly, i.e., the notice required under both Sections is the same, written approval.

Historically, the application of the *written* approval requirement of Section 933(g)(1) has turned on the definition of the term "person entitled to compensation". The Administrative and Judicial tribunals have consistently interpreted this term to mean that *written* approval under Section 933(g)(1) is required only under those circumstances where the claimant either (1) was receiving compensation benefits from the employer at the time of the settlement, or (2) had been judicially determined to be entitled to compensation. By thus interpreting Section 933(g)(1), the

Administrative and Judicial tribunals struck an equitable balance, ensuring that both the overall intent of the Act (encouraging employers to promptly pay injured workers the compensation benefits due them), and the overall intent of Section 933(g) (allaying employer's fears that injured workers whom they paid benefits might anonymously settle their third party claims without allowing the employer to protect their liens), were satisfied.

In 1984, Congress enacted Section 933(g)(2). This Section requires all claimants, irrespective of whether they meet the definition of "person entitled to compensation", to give notice to the employer of any third party settlements. However, Congress, in an effort to protect the claimant from the potential abuse of Section 933(g)(2) (employers withholding compensation *and* written approval in hopes of ultimately not being forced to pay any benefits whatsoever) limited the requirements of 933(g)(2) to requiring *notice*, rather than *written approval*.

The strict interpretation of the words used in Section 933(g)(2) evidence this attempt by Congress to limit the notice requirements. Conversely, the Fifth Circuit's interpretation of 933(g)(2), is both linguistically, and historically, insupportable.

In the captioned matter, the United States Court of Appeals for the Fifth Circuit, disregarded the historical interpretation of Section 933(g)(1), disregarded the natural interpretation of the verbiage in Section 933(g)(2), and circumvented the clear intent of Congress. Instead, the Fifth Circuit unilaterally ruled that all claimants, irrespective of whether or not they were "persons entitled to compensation", were required by Section 933(g) to obtain *written approval* of any third

party settlements. By so ruling, the Fifth Circuit has unwittingly destroyed the equitable balance historically maintained between employees and employers.

ARGUMENT

The Longshore and Harbor Workers' Compensation Act, 933 U.S.C. 901, *et. seq.* was enacted in 1927 to compensate injured longshore and harbor workers for injuries suffered in the course and scope of their employment. Congress intended, and the Supreme Court has held, that the Act should be construed in order to further its purpose of compensating longshore and harbor workers, "and in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249, 268 (1977).

In keeping with this legislative intent, Section 933(g) of the Act provides that the employer be notified prior to any settlement between an injured worker and a third party. As the Fifth Circuit succinctly pointed out in *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644 (5th Cir. 1986), the legislative intent behind Section 933(g) was twofold, namely:

1). To protect the employer's right to directly recover its compensation liability from the third party tortfeasor; and

2). To protect the employer's statutory right to a set-off against its compensation liability for any amount received by the employee from the third party tortfeasor.

Collier, supra at 646.

This intent, enunciated by the *Collier* court, is

clearly in keeping within the overall intent of the Act as set forth in *Voris, supra* and *Northeast Marine, supra*. The Act was meant as social legislation, to compensate longshore and harbor workers for their injuries. Section 933(g) was enacted to encourage employers to pay their compensation liability, by preserving those employer's right to recover such payments from a third party tortfeasor. By requiring notification of any third party settlement, Section 933(g) ensures employers that settlement will not be confected without their approval, thereby alleviating the employers' fear that they will not be recompensed for compensation benefits paid by themselves, but ultimately deemed owed by a third party.

The question that arises is whether Section 933(g) was intended to provide *equal* protection, both to those employers who *are* fulfilling the intent of the Act by paying the claimant compensation benefits; and those employers who *are not* fulfilling the intent of the Act by withholding such compensation benefits. By protecting those employers who *are* paying the claimant compensation benefits, Section 933(g) encourages employers to fulfill their obligation under the Act. Interpreting Section 933(g) to provide *equal* protection to those employers who are *not* paying such compensation benefits circumvents Congress' intent to encourage employers to promptly compensate longshore and harbor workers; rather encouraging employers to withhold compensation benefits until such time as they are judicially ordered to pay such benefits. In any case in which the possibility of a third party settlement arose, the employer could withhold compensation benefits, and withhold written approval of a settlement agreement, in hopes of ultimately

avoiding the payment of any compensation whatsoever. There would be no means to protect a claimant against such withholding. Such an interpretation is clearly contrary to the intent of the Act.

An alternative interpretation, is to read Section 933(g) as providing different levels of protection for the two classes of employers. Under this interpretation, Section 933(g) would be interpreted as requiring *written approval* from an employer who was *paying* compensation; and only *notification* to an employer who was *not paying* compensation. Such an interpretation would reinforce the underlying intent of Section 933(g), encouraging employers to promptly pay compensation benefits by affording said employers greater protection; while conversely mitigating the potential abuse of Section 933(g), by affording lesser protection to those employers who are not paying compensation benefits.

The precise issue before this Court is whether a compromise by a claimant with a third party tortfeasor, without the express written approval of his employer, serves to preclude said claimant from future compensation benefits, irrespective of whether the employer knew of the compromise, and irrespective of whether the employer was either paying claimant compensation benefits, or was under judicial mandate to pay such compensation benefits, at the time of the compromise.

History of 933(g):

Any case involving statutory interpretation necessarily begins with a discussion of the history of the statute. As noted earlier, the Act was promulgated as social legislation, to be construed in order to further its purpose of compensating longshore and harbor workers, "and in a way which avoids harsh and incongruous results. *Voris, supra*; *Northeast Terminal, supra*. Section 933 of the Act, as originally enacted, reserved to these workers, and to their employer, the right to recover damages from third parties causing injury.

In 1959, Section 933 was amended, because of a problem that faced workers attempting to take advantage of the third-party actions reserved them. As noted in the legislative history.

> . . . in exercising his right to sue a third party for damages under section 33 of existing law, the employee must choose whether to collect the compensation to which he is entitled or to pursue the third party suit. He may not pursue both courses.
>
> Existing law works a hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party. His compensation under the act is certain but his chances of winning a third-party liability suit are uncertain. In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit. . .
>
> J.A. 7, p. 121.

To correct this problem, Congress amended Section 933 so as to permit an employee to bring a third-party tort suit without forfeiting his right to compensation under the Act. In so doing, Congress evidenced its intent to ensure that the injured worker

was not forced to choose between compensation benefits and tort recovery. Rather, Congress intended that the worker continue to receive the compensation benefits guaranteed under the Act, and be allowed to proceed in tort. More importantly, Congress intended that the choice of how to proceed, if any, should be left to the injured worker.

At the time of the 1959 amendments, claimants under the Act were able to pursue a variety of third-party tort actions against a large number of potential defendant's, including the claimant's employer. Consequently, claimant's third party actions usually settled for a much larger amount. As claimants were more likely to receive third party settlements which exceeded the amount to which they would be entitled to under the Act, further compensation was often barred under Section 933(f).[1] Thus, in the more usual cases, the claimant had no incentive to press his compensation claim against the employer because the claimant was not entitled to any more benefits. Thus, the problem leading to Congress' amendment in 1959 (the inequity of making an injured worker choose his remedy) was resolved by that amendment's reserving the worker's right to sue in tort *while* receiving compensation.

Now that the general intent of Section 933 has been demonstrated, the question arises as to what part Section 933(g) plays in the legislative scheme. From 1927 until 1972, Section 933(g) read substantially as follows:

[1] Section 933(f) provides that the employer is only liable to the extent that the compensation benefits due the injured worker exceed any amount that the injured worker recovers from a third party.

> "(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if such compromise is made with his written approval."
>
> 44 Stat. 1441; 73 Stat. 392.

There is a dearth of cases construing Section 933(g) during this period.[2] This paucity of litigation involving Section 933(g) prior to 1972 (as opposed to the large number of cases construing Section 933(g) after 1972) is not unusual given the extensive changes wrought by the 1972 amendments to the Act.

The 1972 amendments limited the available actions in tort for persons covered by the Act in exchange for increasing compensation benefits. The 1972 amendments changed Section 933(g) to provide in pertinent part:

[2] The leading cases are *Chapman v. Hoage*, 296 U.S. 526, 56 S.Ct. 333 (1936) (Section 933(g) does not bar a claim for compensation unless the carrier is actually prejudiced by the claimant's failure to prosecute his third party action); *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, 88 S.Ct. 1140 (1968) (claimant's consent to a court ordered remittitur is not a compromise within the meaning of 933(g) because the employer's interest was protected by the trial court in ordering the remittitur); and *Bell v. O'Hearne*, 284 F.2d 777 (4th Cir. 1960) (after claimant's third party action was tried to judgment, settling for a lesser amount was not a compromise as long as the employer was credited for the full amount, because the employer's interest was fully protected).

(g) Compromise obtained by person entitled to compensation.

If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter the employer shall be liable for compensation determined in subsection (f) of this section *only if written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise* on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

33 U.S.C. 933(g).

The above underlined portion of the 1972 amendment raised an interesting question concerning the problems eradicated by the 1959 amendments. By requiring the injured worker to obtain the employer's written approval of any compromise with a third party, the potential arose for employer's to abuse the Act, and circumvent the intent of the 1959 amendments. If the 1972 amendment was read strictly, the employer could withhold approval of any settlement offer, even if the employer was not paying compensation to the injured worker. The injured worker, facing mounting expenses (and consequently unable to outlast the administrative delays required to garner compensation from the employer) could be effectively

forced to forego such compensation, and accept a settlement offer that would meet his current expenses.

This opening for potential abuse by employers was shut by the administrative and judicial tribunals who have, since 1972, interpreted Section 933(g), with the same result.

The Judicial History:

The issue was first faced by the administrative law judge in *O'Leary v. Southeast Stevedore Company*, 5 BRBS 16 (1976). In *O'Leary* the administrative law judge noted that Section 933(g) "presuppose[s] that compensation is not only payable under the Act, but that both claimant and respondent accept that compensation is payable." *Id.* at 24. The decision continued:

> "Only when the decision of the Benefits Review Board and the Order of Judge Bernstein pursuant to that Decision were not appealed, was Claimant's status as such a person assured. Until that time she did not know and Respondent's did not know if she was a person entitled to compensation."

Id. at 25.

Thus, the *O'Leary* judge held:

> "Entitled to compensation means presently recognized as entitled to compensation; it does not mean one who, after arduous years of litigation may finally be declared to be entitled to compensation. The permission of the employer and its carrier to settle a third party action must be obtained only where compensation benefits are acknowledged. Congress did not intend that per-

> mission to settle a third party action must be obtained from a Respondent who (although with apparently valid reason) denies any responsibility to make compensation benefits."
>
> *Id.*

In upholding the administrative law judge's determination, the Benefits Review Board noted that a different interpretation:

> "could result in a claimant not being paid compensation, yet the claimant would be afraid to make a third party settlement for in doing so he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . ."
>
> 7 BRBS 144, 149 (1977).

By so reasoning, the *O'Leary* Board closed the door to the potential abuse of the Act by employers. The Board reasoned that "the very language [of Section 933(g)] contemplat[es] that [the] employer either be making voluntary payments under the Act or that it had been found liable for benefits by a judicial determination." *Id.* at 148. The *O'Leary* decision was subsequently affirmed by the Ninth Circuit. (9th Cir. 1980) (unpublished); J.A. 6. Since the original Administrative Law Judge decision, *O'Leary* has remained the seminal law concerning applicability of Section 933(g).[3]

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[3] See eg. *O'Leary*, 5 BRBS 161 (ALJ, 1976), 7 BRBS 144 (1977), *aff'd. mem.* 622 F.2d 596 (9th Cir. 1980)(unpublished); *Caranante v. International Terminal Operating Company, Inc.*,

The Fifth Circuit faced the issue four years after *O'Leary* in *Kahny v. Director, United States Dept. of Labor and Arrow Contractors of Jefferson, Inc.*, 15 B.R.B.S. 212, *aff'd mem.* 729 F.2d 757 (5th Cir. 1984)(unpublished); J.A.S. The Fifth Circuit held:

> "We find this analysis [*O'Leary*] fully consistent with the language, legislative history, and rationale of Section 933(g). The critical time for the determination whether one is a "person entitled to compensation" is the time of the challenged

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7 BRBS 248 (1977); *Wall v. Wall*, 15 BRBS 197 (ALJ, 1982); *Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd. mem.* 729 F.2d 757 (5th Cir. 1984)(unpublished); *Todd v. J & M Welding Contractors*, 16 BRBS 434 (ALJ, 1984); *Wilson v. Triple A Machine Shop*, 17 BRBS 471 (ALJ, 1985); *Lindsay v. Bethlehem Steel Corporation*, 18 BRBS 20 (1986), 22 BRBS 206 (1989); *Dorsey v. Cooper Stevedoring Company, Inc.*, 18 BRBS 25 (1986); *Nesmith v. Farrell American Station*, 19 BRBS 176 (1986); *Cernousek v. Braswell Shipyards, Inc.*, 19 BRBS 796 (ALJ, 1987); *Quinn v. Washington Metropolitan Area Transit Authority*, 20 BRBS 65 (1986); *Lewis v. Norfolk Shipbuilding and Dry Dock Corporation*, 20 BRBS 126 (1987); *Evans v. Horne Brothers, Inc.*, 20 BRBS 226 (1988); *Mobley v. Bethlehem Steel Corporation*, 20 BRBS 239 (1988), *aff'd.* 24 BRBS 49, 920 F.2d 558 (9th Cir. 1990); *Blake v. Bethlehem Steel Corporation*, 21 BRBS 49 (1988); *Castorinav. Lykes Brothers Steamship Company, Inc.*, 21 BRBS 136 (1988); *Anweiler v. Avondale Shipyards, Inc.*, 21 BRBS 271 (1988); *Armand v. American Marine Corporation*, 21 BRBS 305 (1988); *Fisher v. Todd Shipyards Corporation*, 21 BRBS 323 (1988); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988); *Cunningham v. Kaiser Steel Corporation*, 21 BRBS 154 (ALJ, 1988); *Picinich v. Lockheed Shipbuilding*, 22 BRBS 289 (1989); *Glenn v. Todd Pacific Shipyards Corp.*, 22 BRBS 254 (ALJ, 1989); *Sellman v. I.T.O. Corporation of Baltimore*, 24 BRBS 11 (1990); *Cretan v. Bethlehem Steel Corporation*, 24 BRBS 35 (1990); *Reaux v. H & H Welders & Fabricating*, 24 BRBS 7 (ALJ, 1990).

settlement. If, at that time, the employer is not making voluntary payments, and no award had been ordered by an ALJ, the claimant is not a "person entitled to compensation" under Section 933(g), and is not obliged to secure prior approval for a third party tort settlement."

J.A. 5, p. 108, 109.

The 1984 Amendment:

In 1984, Section 933(g) was again amended by Congress. The 1984 amendments redesignated pre-1984 Section 933(g), replete with the "persons entitled to compensation" language, as post-1984 Section 933(g)(1). The legislative history signifies no intent by Congress to overrule the interpretation of Section 933(g) adopted by *O'Leary* and its progeny. Congress is presumed to be aware of the administrative and judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 870 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951).

Applying the above rule of statutory construction, the administrative law judge in *Wilson v. Triple A Machine Ship*, 17 BRBS 471 (ALJ, 1985) noted:

> "the key words for purposes of the *O'Leary* decision, *supra*, and the others following it are "the person entitled to compensation." . . . The 1984 amendment did not change this language. On the contrary, [Section 9]33(g) begins: "If the person entitled to compensation." . . . Thus it can be inferred that where a claimant is not being paid voluntarily or under an award he is not "a person entitled to compensation" and [Section 9]33(g)(1) does not apply."

Id. at 477.

Clearly, as Congress did not remove the "person entitled to compensation" language from Section 933(g) when it reenacted that Section as Section 933(g)(1), and the legislative history does not indicate any intent by Congress to overrule the *O'Leary* line of jurisprudence, the *O'Leary* definition of "person entitled to compensation remains viable.

Given this, the only remaining issue before this Court, is whether the 1984 addition to Section 933(g), specifically, Section 933(g)(2), has any bearing on Petitioner's right to receive compensation. Section 933(g)(2) provides:

> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. 933(g)(2).

In construing this language, the Court is obliged to give effect, if possible, to every word Congress used. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *U.S. v. Menasche*, 348 U.S. 528, 538-539 (1955). In this regard it is noted that Section 933(g)(2) applies

"*regardless* of whether the employer or the employer's insurer has made payment or acknowledged entitlement to benefits under this chapter." This language, strikingly similar to the *O'Leary* language defining "persons entitled to compensation", is noticeably absent from Section 933(g)(1). By adding this language to Section 933(g)(2), Congress clearly intended to preserve the distinction promulgated by the courts in *O'Leary* and its progeny between those claimants who are "persons entitled to compensation" and those claimants who are *not* "persons entitled to compensation".

O'Leary's continued viability is further buttressed by Congress' continued use of the language "persons entitled to compensation" in Section 933(g)(1) after 1984, as opposed to Congress' use of the language "employee" in Section 933(g)(2). This language evidences an intent that Section 933(g)(1) apply only to those claimants who are "persons entitled to compensation", as defined in *O'Leary*, and that Section 933(g)(2) apply to all claimants who are "employees", irrespective of whether said employees are also "persons entitled to compensation". It is respectfully submitted that this attempt to distinguish the two classes of claimants indicates a clear intendment to codify the *O'Leary* distinction. This distinction between the two classes is evident throughout the amended Section 933(g) as will be discussed infra.

Further examining the precise language of Section 933(g)(2), it is noted that, under Section 933(g)(2), a claimant's right to compensation benefits is forfeited: (1) if no written approval of the settlement is obtained and filed as required by paragraph 933(g)(1), *or* (2) if the employee fails to notify the employer of any

settlement obtained from or judgement rendered against a third person.

The first disjunctive portion above applies to those claimants who did not acquire the written approval required by Section 933(g)(1). Since under *O'Leary* the only claimants required to acquire written approval by Section 933(g)(1) are "persons entitled to compensation", this first disjunctive portion makes Section 933(g)(2) applicable to those "persons entitled to compensation" who did not comply with the written approval requirements of Section 933(g)(1). As Petitioner is not a "person entitled to compensation", this first portion of the disjunctive test does not serve to bring Petitioner within the purview of Section 933(g)(2).

However, the second portion of the disjunctive test does serve to bring Petitioner under the mandate of Section 933(g)(2). This test is not limited to those claimants who are required to obtain written approval under Section 933(g)(1), i.e. "persons entitled to compensation". Rather, this second portion applies to all claimants who are "employees", including, *but not limited to*, "persons entitled to compensation". As Petitioner was an "employee" of Nicklos, he was required to fulfill the requirements of this second portion of the Section 933(g)(2) disjunctive test.

Notably, the second portion of the disjunctive test requires the "employee" to *notify* the employer of any settlement, as distinguished from the requirement of *written approval* imposed on "persons entitled to compensation" by Section 933(g)(1), and the first disjunctive portion of Section 933(g)(2). Clearly, this wording indicates an intent to distinguish between the type of notice required by the various classes of claim-

ants. While Section 933(g)(1) claimants, i.e. "persons entitled to compensation", are required to obtain *written approval*, the broader class of Section 933(g)(2) claimants, i.e. "employees", are required only to *notify* the employer.

As the administrative law judge in *Wilson, supra* noted:

> "The distinction between approval and notice is highlighted by the fact that settlement and judgement are mentioned in the same phrase: "if the employee fails to notify the employee of any settlement obtained from or judgment rendered against a third person . . ." Notice of judgment makes sense; approval of judgment would not. In *Banks, supra*, the Supreme Court expressly held that a judge's action in reducing a jury's award adequately protected the employer's interest in the adequacy of the award—and that is the only interest the employer has in the third party action.
>
> *Wilson, supra* at 478.

Interpreting Section 933(g)(2) any other way would render a portion of the statute inoperative, a violation of the rules of statutory construction set out by this Court. See Eg. *Colautti v. Franklin*, 439 U.S. 379, 392 (1977), citing, *Menasche, supra* at 538-539. This is clear once it is realized that the Section 933(g)(1) claimants, i.e. "persons entitled to compensation", necessarily fall into the broader class of Section 933(g)(2) claimants, i.e. "employees". If Congress had intended the Fifth Circuit's interpretation of 933(g)(2), i.e. 'notify' = 'obtain written approval', than Section 933(g)(2) would effectively read: "If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to obtain written approval from the employer of any settlement obtained from or judgment rendered against a third person, . . ." Clearly, under the Fifth Circuit's interpretation, the second portion of the Section 933(g)(2) disjunctive test would have sufficed to cover the situation currently described in the first portion. By making Section 933(g)(2) disjunctive, Congress clearly intended to retain the distinction enunciated by *O'Leary*, and to further clarify *O'Leary* by proscribing the slighter burden required by claimants who were not "persons entitled to compensation" under Section 933(g)(1).

In *Robinson Terminal Warehouse Corporation v. Adler*, 440 F.2d 1060, 1062 (4th Cir. 1971), the court held as a matter of law that where the employer of an injured longshoreman issued a draft in payment of an agreed third party tort settlement, the employer approved of the compromise for purposes of Section 933(g). In the captioned matter, Nicklos issued the payment of Cowart's settlement with Transco. Thus, Petitioner has met the notification requirement of Section 933(g)(2), the forfeiture language of Section 933(g)(2) was not triggered, and Petitioner's claim for compensation was left intact.

The Benefits Review Board's Interpretation After 1984:

Since the 1984 amendments, the Benefits Review Board has adopted the above enunciated interpretation of Section 933(g)(2).

In *Dorsey v. Cooper Stevedoring, Inc.*, 18 B.R.B.S 25 (1986) the Board addressed the effect of the ad-

dition of Section 933(g)(2) on claimants who were not receiving compensation benefits at the time of the third party settlement. The *Dorsey* Board held that this Section clearly applies regardless of whether the employer has made any compensation benefits to the claimant. *Dorsey*, *supra* at 29, 30. The Board continued:

> "It [Section 933(g)(2)] applies if no written approval is obtained pursuant to Section 933(g)(1) *or* if the employee fails to notify the employer of any settlement or judgment in a third party action."
>
> *Id.*

The Board in *Dorsey* concluded that where a claimant is *not* a "person entitled to compensation" he is required to *either* obtain written approval *or* notify the employer of the third party settlement. *Id.*

Similarly, in *Pinell v. Patterson Service*, 22 B.R.B.S. 61 (1989), the Board held that:

> ". . . under subsection 33(g)(1), just as under the 1972 version of Section 933(g), claimant is barred from receiving further compensation under the Act if he is a 'person entitled to compensation', i.e. employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement. Under subsection 33(g)(2), regardless of whether employer has made payments or acknowledged entitlement, the employer must at a minimum be given notice of a settlement or compensation and medical benefits are barred; *written approval is not required.*"
>
> *Id.*

Because Petitioner was not a "person entitled to compensation" under any of these interpretations, Petitioner was required only to notify Nicklos of the settlement agreement; *written approval was not required.* As Nicklos funded the settlement agreement, the Section 933(g)(2) notification requirement was met. Thus, Petitioner's right to future compensation benefits was preserved.

The Director's Interpretation After 1984:

Petitioner recognizes that the Board's interpretation of Section 933(g)(2) is entitled to no special deference, since the Board does not "administer" the Act. Conversely, the Director, Office of Workers' Compensation Programs, who is charged with the administration of the Act, is entitled to such deference. *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1046 & n. 23 (5th Cir. 1982) (en banc). Thus, unless the Director's interpretation is unreasonable or contrary to the purpose of the statute, the Director's interpretation of the Act should be accepted. *Chemical Manufacturers Association v. NRDC*, 470 U.S. 116, 125-126 (1985).

In its brief submitted before the Fifth Circuit in the captioned matter, the Director noted:

> "The Director's general construction of Section 33(g), insofar as here relevant, accords precisely with the Board's decisions on point. Under the administrative construction, also adhered to by the Board, the written-approval requirement of Section 33(g)(1) was inapplicable to Cowart because of Nicklos Drilling's refusal, as of the time of the tort settlement, to acknowledge his right

> to any compensation beyond the time (over a year before the settlement) when he was released to return to work; and he satisfied Section 33(g)(2), which was applicable to his case, by complying with one of its two alternative requirements, that of giving notice to the employer."
>
> Director's brief, p. 13.

The Fifth Circuit's Interpretation After 1984:

In reversing the Board's affirmance of Petitioner's compensation award, the Fifth Circuit held:

> ". . . we hold that there are no exceptions whatever to the "unqualified" language of Section 933. Rather, "the employer shall be liable for compensation. . .only if written approval of the settlement is obtained from the employer and the employer's carrier. . ."
>
> J.A. 2, p. 38.

While the Fifth Circuit's holding is correct in its verbiage, the Court failed to follow the express "unqualified" language which it cites. Section 933(g)(1) provides that written approval is required when the claimant is a "person entitled to compensation." Because Petitioner is *not* a "person entitled to compensation," the "unqualified" language of Section 933(g)(1) does *not* apply to Petitioner.

The Fifth Circuit continued:

> ". . . In this instance "only" means "only" and, absent any room for interpretation or construction, we give it its intended meaning. Should Congress wish to give it another, it need only say so."
>
> *Id.*

Petitioner respectfully submits that Congress has already enunciated its intent to limit the written approval requirement of Section 933(g)(1) by enacting Section 933(g)(2) in 1984. The interpretation and construction indicated by this enactment has been discussed in detail supra, and need not be reiterated here. Suffice it to say, that under the Supreme Court's rules of statutory interpretation and construction set out in *Colautti* and *Menasche*, the Fifth Circuit's broad-brushed interpretation of Section 933(g)(2) is insupportable.

In reaching its decision, the Fifth Circuit relied exclusively on their decision in *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644 (5th Cir. 1986). The language in *Collier* is indeed strong.

> "Section 933(g)(1) is brutally direct: "the employer shall be liable for compensation. . .only if written approval of the settlement is obtained from the employer and the employer's carrier."
>
> *Collier* at 647.

By adopting this language on its face, without taking into consideration the factual situation to which it pertained, the Fifth Circuit, circumvented the clear intent of the 1984 legislative amendments to the Act discussed supra. A brief review of the facts in *Collier*, bears this assertion out.

In *Collier*, claimant, David Collier, was injured while working as a helicopter pilot for PHI. *Collier* at 645. The injury occurred on the landing platform of a rig owned by Conoco. *Id.* Collier thereafter applied for and received benefits from PHI's carrier. *Id.* Collier subsequently sued Conoco in Federal District Court,

seeking $750,000.00 in damages. *Id.* Collier settled his claim against Conoco on April 17, 1979. *Id.* This settlement was confected without the approval of PHI or its carrier, and compensation benefits were *terminated for that reason* on April 17, 1979. *Id.*

As the foregoing summary shows, David Collier was receiving compensation benefits from his employer at the time he settled with Conoco. Evaluating this situation under the *O'Leary* criteria, Collier was clearly a "person entitled to compensation", and thus was clearly under the purview of Section 933(g)(1). Examined in this light, *Collier's* harsh wording is correct. As to "*persons entitled to compensation*", Section 933(g)(1) is "brutally direct." David Collier, as a "person entitled to compensation" *was* entitled to benefits *only* if written approval of the settlement was obtained from the employer and the employer's carrier.

By contrast, the Administrative Law Judge in the case at bar, determined that Petitioner was *not* receiving compensation benefits at the time of his settlement with Transco, and thus was *not* a "person entitled to compensation" under *O'Leary* and its progeny. Thus, Petitioner does not fall under the purview of Section 933(g)(1). Rather, Petitioner, as an "employee", but not a "person entitled to compensation", falls under the purview of Section 933(g)(2) and therefore need only *notify* the employer of his settlement with the third party. As Nicklos not only knew of the proposed settlement agreement, but actually paid it, Section 933(g)(2)'s notification requirement was clearly met, and Petitioner's right to compensation benefits was not forfeited.

The Ninth Circuit's Interpretation After 1984:

The Fifth Circuit's determination is clearly at odds with the Ninth Circuit's decisions in *O'Leary*, (discussed supra) and *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558 (9th Cir. 1990). While *Bethlehem Steel* concerned a claimant's right to medical benefits, the decision discussed the interpretation of Section 933(g)(2).

> "Section [9]33(g)(2)'s notification requirement thus serves two purposes. First, it enables an employer to protect its right to set off the amount of a settlement against any future obligations it might have. See 33 U.S.C. 933(f). Second, it ensures that an employer is able to protect its right to reimbursement from the proceeds of a third-party settlement in the amount of any payment the employer has already made. . . *So long as the employer has notice of the settlement before it has made any payments and before the Agency orders it to make any payments, the purposes of the statute are satisfied.*
>
> *Id.* at 561.

The above emphasized language in the decision enunciates the same criteria upon which *O'Leary* and its progeny rely, indicating that *O'Leary* is still good law in the Ninth Circuit. Indeed, the Ninth Circuit held:

> "a claimant's notice to an employer of a third-party settlement before the employer has made any payments and before the Agency has announced any award is sufficient under section [9]33(g)(2).
>
> *Id.* at 562.

In the captioned matter, Nicklos, by paying the set-

tlement amount to Petitioner, certainly had notice of said settlement during the period that it was not paying Petitioner the compensation benefits he was due. It is clear that had Petitioner's claim arose in the Ninth Circuit, the court would have reached a different result.

CONCLUSION

The Longshore and Harbor Worker's Act is the source of compensation for thousands of injured workers in this country. Section 933(g) is the portion of that statute that deals with the rights of both employees and employers, in any case in which a third party may be liable. Until recently, Congress and the judiciary have struck an equitable balance between the interests of these two groups.

The Fifth Circuit in the captioned matter has destroyed the balance that has existed for so long. Their decision finds no support, in either the legislative history of the Act, or the strict linguistic interpretation of the words used. Nor does their decision find any support in the prior interpretations of this statute by the Judiciary. Conversely, the captioned decision constructively overrules over thirteen years of Administrative and judicial precedent.

The legislative history, and the general rules of statutory construction, mandate that Section 933(g) can only be interpreted as requiring *written* approval of third-party settlements confected by employees who *are* "persons entitled to compensation", and *notice* of third party settlements by employees who are *not* "persons entitled to compensation." To interpret Section 933(g) otherwise would result in incongruous results, not in accord with the liberal nature of the Act.

For the foregoing reasons, the Fifth Circuit's reversal of the case at bar should be vacated, and the Decision and Order of the Benefits Review Board should be affirmed.

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NO. 91-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ESTATE OF FLOYD COWART,
Petitioner,

v.

NICKLOS DRILLING COMPANY and
COMPASS INSURANCE COMPANY,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENTS

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On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENTS NICKLOS DRILLING COMPANY and COMPASS INSURANCE COMPANY[1]

STATEMENT

The statement of the case contained in Petitioner's brief is generally correct, although it is misleading in one respect which may prove significant.

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1. There are no parent or subsidiary companies to be listed for Respondent Nicklos Drilling Company in compliance with Supreme Court Rule 29.1. Respondent Compass Insurance Company is a subsidiary of Armco Steel Corp.

The assertion by Petitioner that Respondent Nicklos failed to pay LHWCA[2] benefits to Cowart after having "acknowledged liability" therefor and being "instructed by the Department of Labor to pay said benefits" [Brief for Pet., p.4], is not correct.

Cowart made a claim against his employer (Nicklos) and its carrier (Compass) for benefits under LHWCA for an accidental injury sustained on July 20, 1983, and also filed a civil suit against a third party in the U.S. District Court for the Eastern District of Louisiana seeking to recover damages for the same accidental injury. The carrier paid Cowart benefits for temporary total disability from the date of the injury until May 21, 1984, when he was released to return to work. These payments were voluntary, pursuant to LHWCA Section 14(a), 33 U.S.C. § 914(a), and no formal compensation award was made. Despite Petitioner's assertion that Cowart was "automatically entitled" to additional benefits, his employer and carrier never acquiesced in any such claim, and no formal claim to such effect or request for hearing thereon was ever presented by Cowart to the Department of Labor after voluntary benefits were terminated and before he had consummated his third party settlement over thirteen months later. Cowart settled his third party suit on July 1, 1985 without obtaining the written approval of the employer or carrier as required by LHWCA Section 33(g), 33 U.S.C. § 933(g).

SUMMARY OF ARGUMENT

The applicable statutory wording addresses the present situation unambiguously. Where a claimant settles a third

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2. Longshore & Harbor Workers' Compensation Act, 933 U.S.C. § 901, *et seq.*

party civil action for less than the LHWCA benefits he would be entitled to receive from his employer, the written consent of the employer and carrier is required; otherwise he forfeits any additional benefits. The only situations to which the "written consent" requirement is inapplicable consist of cases of recovery by judgment in a civil action or in which the claimant settles for more than his employer's compensation liability, and these instances are governed by a separate "notice" requirement. Under no circumstances is a claimant who is subject to the "written consent" requirement entitled to substitute compliance by reference to the "notice" requirement. The statute treats the two situations distinctly.

The effort by the agency administering the statutory scheme to revise its operation by in-house interpretation runs afoul, in this case, of the principle that no construction contrary to plain statutory language is permitted when Congress has directly spoken to the precise question at issue and its intent is clear. The statutory language has been aptly characterized by the Court of Appeals as framing "an unmistakable scheme". Moreover, the agency's lament about hardship for claimants pursuing civil actions without benefit of their LHWCA benefits is unwarranted. The statute expressly provides for the formal prosecution of a compensation claim during the pendency of a civil action, and a summarily enforceable compensation order may be obtained if an employer declines to make voluntary payments at any time.

ARGUMENT

The Court of Appeals has held that Section 33(g) of the LHWCA[3] permits no exception to its requirement that all settlements with third persons that leave the employer liable

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3. 33 U.S.C. § 933(g).

for further compensation benefits must have the prior written approval of the employer and the employer's insurance carrier. In so holding the court below rejected the persistent effort of the Office of Worker's Compensation Programs (OWCP) to delete, or at least dilute, the language of Section 33(g) through an in-house administrative interpretation which has won the relentless support of the Department of Labor's Benefits Review Board (BRB) and which is championed by Petitioner in this Court.

The BRB's seminal case on the issue is *Dorsey v. Cooper Stevedoring Company, Inc.*, 18 B.R.B.S. 25 (1986), in which the Board articulated a construct of Section 33(g) which holds that its two subsections apply to distinct situations: The applicability of Section 33(g), subsection (1), is contingent upon the condition that the employee is receiving LHWCA benefits *at the time* of a third party settlement; otherwise, subsection (2) applies. Furthermore, this construct holds that only a "subsection (1) employee" is required to comply with the "written approval" requirement, whereas a "subsection (2) employee" is given the option of merely notifying his employer and its carrier that he has made such a settlement. *Id.* 18 B.R.B.S. at 29. The BRB rationalizes this construct by interpreting the phrase in the first sentence of § 33(g)(1) -- "person entitled to compensation" -- to mean "one who is receiving compensation payments voluntarily at the time he settles his claim with a third party"; and further by construing the subordinate clauses joined by the conjunction "or" in § 33(g)(2) as affording the employee an option of eschewing compliance with the "written approval" requirement and substituting simple notice to the employer/carrier instead. *Id.*, 18 B.R.B.S. at 29-31.

The Fifth Circuit rejected this construct in *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644 (5th Cir. 1986).

In that case, the BRB had affirmed an Administrative Law Judge's order awarding future compensation benefits to a claimant notwithstanding his failure to obtain written approval of his employer and its carrier of a settlement of a third party liability action. The claimant in *Collier* contended that the requirement of § 33(g)(1) was "suspended" because his employer and the carrier had contractually waived their own subrogation rights against the third party tortfeasor. The Fifth Circuit pointed out that there is nothing in the language of § 33(g) to support an exception to the "unqualified requirement that an employee obtain the consent of the employer and carrier for any settlement with a third party tortfeasor", adding the following comment:

> *** To the contrary, § 933(g)(1) is brutally direct: 'the employer shall be liable for compensation ... *only* if written approval of the settlement is obtained from the employer and the employer's carrier' (emphasis added).

784 F.2d at 647.

Undaunted, the BRB refused to follow *Collier* in the present case, complaining that the Fifth Circuit had failed to consider "[t]he changes made in § 933(g) in 1984 with the addition of § 933(g)(2) and their effect on claimants who were not paid benefits voluntarily or pursuant to an award ***." [Decision and Order of the BRB, J.A. 54.] Actually, the Fifth Circuit expressly discussed § 933(g)(2) in its opinion in *Collier* and found the language of that subsection to be reinforcing of its holding in that case:

> *** As if the language of § 933(g)(1) weren't clear enough, the mandatory nature of the written approval requirement is reiterated in

§ 933(g)(2), *so that the two provisions frame an unmistakable scheme* ***.

784 F.2d at 647 (emphasis added). Moreover, the Fifth Circuit went on in its opinion to quote directly from the legislative history of the 1984 amendments to the LHWCA and observe that it "admits no exception to the written approval requirement". *Id.*[4]

In the court below, the OWCP supported its position by arguing that the essential purpose of § 33(g) is to allow a claimant entitled to LHWCA benefits to receive those benefits and still pursue civil remedies against third persons, and reasoning from this that it is a necessary extension of the congressional intent that claimants who choose to pursue civil actions should not face the financial hardship of having to forego receipt of LHCWA benefits during the pendency of the civil action. The OWCP contends that the actual payment of benefits is the "price" which Congress intended employers to pay for the right of prior approval; thus, settlements require prior written approval only if the employer or its carrier is actually paying benefits at the time the settlement is confected.

A secondary argument made in support of this construction by the OWCP is that the language following the disjunctive "or" in Section 33(g)(2) would be rendered partially meaningless if prior written approval of all settlements were always required, because the alternative of merely notifying the employer of such a settlement would have no function.

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4. There is no indication from the skimpy legislative history pertaining to the 1984 amendment of § 33(g) that Congress was aware of the administrative construction, or of the BRB decisions, at the time it revised the statute.

The decision of this case necessarily requires an examination of the proper method of a court's review of an agency's construction of the statute which it administers. Congress provided for an appeal to the Courts of Appeals as to issues of law decided by the BRB. *See* LHWCA § 21(c), 33 U.S.C. § 921(c). No deference is due to the construction given to the LHWCA by the BRB, since the BRB does not "administer" the statutory scheme. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S.268, 278 n. 18, 66 L.Ed.2d 446, 101 S.Ct. 509 (1980). However, the OWCP, being charged with the administration of the Act, is entitled to such deference--but only with respect to an interpretation which is not unreasonable nor contrary to the purpose of the statute, and further provided that the statute is silent or ambiguous with respect to the specific issue. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). On the other hand, where Congress has directly spoken to the precise question at issue, and its intent is clear, it is the duty of both the court and the agency to give effect to the unambiguously expressed intent of Congress. *Demarest v. Manspeaker*, 498 U.S. ____, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991). It follows that an administrative interpretation of a statute contrary to the plain statutory language is not entitled to deference. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989). Where the statutory language and its meaning is plain, even subsequent reenactment does not constitute an adoption by Congress of a previous administrative construction contrary to the plain meaning of the language. *Leary v. United States*, 395 U.S. 6, 24-25, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); *Demarest v. Manspeaker, supra*, 498 U.S. at _____, 112 L.Ed.2d at 616.

With these principles in mind, it is submitted that the OWCP's supposed rationale for the argued construct of Section 33 finds no room for implication in the wording of the statute. The contention that Congress intended the actual payment of LHWCA benefits to be a trade-off for the right of prior approval is irreconcilable with the language of Section 33, which quite literally provides no exception to its approval requirement. Moreover, it is squarely refuted by the provision of Section 33(g)(2) that LHWCA benefits "shall be terminated, *regardless* of whether the employer or the employer's insurer *has made payments or acknowledged entitlement to benefits* under the chapter." [Emphasis added.]

By the same token, a careful reading of Section 33(g)(2) disproves the OWCP's assertion that the "disjunctive alternative" reading of that section is necessary to avoid rendering the "notification" phrase mere surplusage. Rather, the necessary purpose of this phrase is to extend the notification requirement to those third party recoveries--either by settlement or judgment--to which the prior written approval requirement is inapplicable. The employer/carrier's written approval is of no effect in the case of a *judgment* against a third party, nor is prior written approval required unless the amount of the settlement is "less than the compensation to which the [claimant] would be entitled under this chapter." By virtue of Section 33(g)(2), only notification is required when a claimant either recovers a judgment or settles for an amount exceeding his LHWCA compensation entitlement. In those situations, notification satisfies the employer's only interest in the third party recovery, which is an offset to future compensation liability. *See*, LHWCA § 33(f), 933 U.S.C. § 33(f). Thus, as the Court below stated, the "schemes of approval and notification dovetail perfectly; there is no ambiguity." *Nicklos Drilling Company v. Cowart*, 927 F.2d 838, 832 (5th Cir. 1991) (en banc).

It is submitted that the fallacy of the OWCP's position is demonstrated to be complete when one considers that the proposed construction of Section 33(g) is not necessary to prevent the financial hardship to persons pursuing civil remedies, which the OWCP professes to be its primary concern. Section 33(a), 933 U.S.C. § 933(a), expressly provides that persons entitled to LHWCA benefits need not make an election of remedies, but rather they may receive LHWCA benefits while simultaneously pursuing their civil remedy. If an employer refuses to pay benefits to which the claimant feels he is entitled, then he has a right at any time--notwithstanding the pendency of a civil suit--to pursue his claim to a formal hearing and obtain a compensation order.[5] In the present case, this is what Petitioner's decedent did not do until *after* he had consummated a settlement of his civil action. It was only then that he chose to assert the statutory right which had always been his. As the court below stated,

> To the extent that LHWCA claimants may choose to ignore their rights and responsibilities under section 33, Congress did not and cannot have intended to guard against such self-inflicted hardship.

Nicklos Drilling Company v. Cowart, supra, 927 F.2d at 832. In the present case, Petitioner's decedent slumbered on

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5. Section 19(c) of the LHWCA, 33 U.S.C. § 919(c), provides that "upon application of any interested party" the deputy commissioner in the compensation district where the claim is pending "shall order a hearing thereon". An order either rejecting the claim or awarding compensation must be entered within twenty days after the hearing. Thirty days after the order is filed, it becomes final and summarily enforceable in U.S. District Court pursuant to Section 21, 33 U.S.C. § 921.

his rights for over thirteen months after voluntary payment of benefits was terminated, drawing no compensation and pursuing his civil action to a settlement, all the while charged with the knowledge that the "brutally direct"[6] wording of Section 33(g) would preclude recourse to further benefits under the LHWCA once the civil suit was settled.

CONCLUSION

The Court of Appeals properly rejected the invitation to effectively rewrite the congressional act by adopting the administrative construct contended for by Petitioner, urged by the OWCP and adopted by the BRB. The wording of the statutory provision in issue does not permit any ambiguity concerning the proper resolution of the question presented, nor is there any legislative history suggesting the basis for a judicial gloss upon the unvarnished wording of the statutory provision in issue. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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6. From the Fifth Circuit's opinion in *Collier*, quoted *supra*, 784 F.2d at 647.

No. 91-17

In the Supreme Court of the United States

OCTOBER TERM, 1991

ESTATE OF FLOYD COWART, PETITIONER

v.

NICKLOS DRILLING CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Section 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g), provides that if a "person entitled to compensation" settles a claim against a third party for less than the compensation that would be payable under the LHWCA without obtaining the prior written approval of the employer and the employer's insurance carrier, he forfeits his rights under the statute to compensation and medical benefits. The question presented is whether the approval and forfeiture provisions are applicable to a person who was not receiving and had not been awarded LHWCA compensation at the time he entered into the settlement with the third party.

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BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (J.A. 1-29) is reported at 927 F.2d 828. The panel opinion (J.A. 30-39) is reported at 907 F.2d 1552. The decision and order of the Benefits Review Board (J.A. 40-67) is reported at 23 Ben. Rev. Bd. Serv. (MB) 42. The decision and order of the administrative law judge (J.A. 68-95) is reported at 19 Ben. Rev. Bd. Serv. (MB) 457 (ALJ).

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1991. The petition for a writ of certiorari was filed on June 27, 1991, and granted on December 9, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 33 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 933, is reprinted in the appendix to this brief (App., *infra*, 1a-5a).

STATEMENT

1. On July 20, 1983, Floyd Cowart sustained an injury to his hand while working on an oil drilling platform owned and operated by Transco Exploration Co. (Transco). J.A. 32, 42, 74. The platform was located on the Outer Continental Shelf. Cowart's disability claim was therefore governed by the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* See 43 U.S.C. 1333(b); J.A. 68-69. Cowart's employer, Nicklos Drilling Co. (Nicklos), through its insurer, Compass Insurance Co., paid him temporary totai disability benefits from July 21, 1983, through May 21, 1984. J.A. 33, 42, 75. Cowart was released to return to work in May 1984, but he was rated as having a 40% permanent partial disability. The Department of Labor notified Nicklos' carrier that Cowart was owed permanent partial disability compensation in the amount of $35,592.77, plus penalties and interest.[1] Nicklos, however, did not pay that compensation. J.A. 42, 76.

The LHWCA does not require a person entitled to compensation to elect between receiving compensation from his employer and seeking tort damages

[1] Section 14(a) of the LHWCA, 33 U.S.C. 914(a), requires an employer to pay compensation promptly without an award unless the claim is controverted. Section 14(e), 33 U.S.C. 914(e), increases an employer's liability by 10% if it does not pay or contest eligibility within 14 days of notice that compensation is due.

from a third party. 33 U.S.C. 933(a). Cowart thus filed a negligence action against Transco, the owner and operator of the drilling platform where his injury occurred. J.A. 32-33. On July 1, 1985, Cowart settled the action for $45,000. After paying attorney's fees and expenses, Cowart netted $29,350. J.A. 33, 76-77. Nicklos had prior notice of the settlement but did not give its written consent.[2] J.A. 77, 92.

2. After settling with Transco, Cowart filed an administrative claim with the Department of Labor. The claim sought the difference between the net amount of his settlement with Transco and the compensation he was due under the LHWCA, as well as future medical benefits and interest. See J.A. 33, 60-64, 93. He relied on Section 33(f) of the LHWCA, 33 U.S.C. 933(f),which provides that when a person entitled to compensation recovers damages from a third party who was liable for the employee's injuries or death, the employer is liable for compensation payments that exceed the net amount recovered from the third party. Although stipulating that Cowart was permanently partially disabled, J.A. 73, Nicklos contended that, under Section 33(g) of the LHWCA, 33 U.S.C. 933(g), Cowart's failure to obtain Nicklos' written consent to the settlement with Transco relieved Nicklos of its obligation to pay further compensation or medical benefits.[3] J.A. 70.

[2] Nicklos had agreed to indemnify Transco for its liability. See J.A. 49-50. Such an indemnification agreement, while generally not given effect under the LHWCA, is lawful with respect to injuries occurring on the Outer Continental Shelf. 33 U.S.C. 905(b) and (c).

[3] Section 33(g)(1) requires that the "person entitled to compensation" must obtain the prior written approval of the

The administrative law judge (ALJ) ordered Nicklos to pay benefits. The ALJ held that Nicklos' consent to the settlement was not necessary because the approval requirement under Section 33(g) applies to a claimant "[o]nly where an employer voluntarily pays compensation or where an award is entered." J.A. 84. Because Cowart was not receiving benefits at the time he executed the settlement and no award had been entered, the ALJ determined that he was not a "person entitled to compensation" within the meaning of 33 U.S.C. 933(g)(1) and was not required to obtain his employer's prior written approval of the settlement. J.A. 77-92.

The Benefits Review Board affirmed. J.A. 40-67. It noted that prior to the 1984 amendments to the LHWCA,[4] the Board had ruled that "a claimant was a 'person entitled to compensation' within the meaning of Section 33(g)" only "if [the] employer was paying benefits either voluntarily or pursuant to an award at the time of the third party settlement." J.A. 54-55, citing *O'Leary* v. *Southeast Stevedoring Co.*, 7 Ben. Rev. Bd. Serv. (MB) 144 (1977), aff'd mem., 622 F.2d 595 (9th Cir. 1980). If the claimant "was not receiving benefits," the Board stated, the prior approval requirement of Section 33(g) "did not apply." J.A. 55. The 1984 amendments added to the LHWCA Section 33(g)(2), 33 U.S.C. 933 (g)(2), which states in pertinent part that "[i]f

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employer and its carrier with respect to a settlement with a third party for less than the compensation that would be due. Section 33(g)(2) imposes the sanction of forfeiture of rights under the LHWCA for failure to obtain the required approval and to file it properly with the deputy commissioner. 33 U.S.C. 933(g)(1) and (2).

[4] See Pub. L. No. 98-426, § 21(d), 98 Stat. 1652 (1984).

no written approval of the settlement is obtained and filed as required by paragraph (1), * * * all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." *In Dorsey* v. *Cooper Stevedoring Co.*, 18 Ben. Rev. Bd. Serv. (MB) 25 (1986), appeal dismissed, 826 F.2d 1011 (11th Cir. 1987), the Board held that, despite the 1984 amendments, the approval requirement applied only to claimants receiving or awarded benefits. Relying on *Dorsey*, the Board held that Cowart was therefore not required to obtain the employer's approval. J.A. 55-57.

3. Respondents sought review in the court of appeals. The Director, Office of Workers' Compensation Programs, appeared in the case as a respondent and defended the Board's decision. The court vacated the Board's decision and order. J.A. 30-39. The court stated that under Section 33(g), there are no exceptions to the "unqualified" requirement that an employer is liable for compensation that exceeds a third-party settlement only if the employer and its carrier give prior written approval to the third party settlement. J.A. 38. It therefore held that "future LHWCA benefits must be denied an employee who fails to obtain prior consent by his employer/carrier to the settlement of his claim against a third party tortfeasor." J.A. 32.

To resolve a conflict with its earlier unpublished decision in *Kahny* v. *OWCP*, 729 F.2d 777 (1984) (Table), the court of appeals granted suggestions for rehearing en banc filed by the Director and Cowart, and affirmed the panel decision. J.A. 3-4,

21.[5] The court held that Section 33(g) unambiguously requires an employer's prior written approval of all settlements for less than the compensation due, whether or not the claimant was receiving LHWCA compensation at the time of settlement. The court therefore refused to give deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Director's contrary interpretation. J.A. 13-16.

In rejecting the Director's view of the meaning of the phrase "person entitled to compensation," the court initially noted that there are no textual exceptions to the approval requirement in Section 33(g). J.A. 17. Next, the court pointed out that Section 33(g)(2) expressly states that benefits for noncompliance with the approval requirement are terminated "regardless of whether the employer * * * has made payments or acknowledged entitlement to benefits under this chapter," 33 U.S.C. 933(g)(2). That provision, the court stated, "squarely refutes" the Director's argument that the employer's actual payment of benefits was necessary for the employer to have the right of prior approval under Section 33(g). J.A. 18. Finally, the court concluded that the Director's reading of Section 33(g) was unnecessary to prevent financial hardship to claimants pursuing civil actions. Any such hardship on claim-

[5] In the same opinion, the en banc court of appeals considered another case raising the same issue and similarly affirmed the panel's decision vacating the Board's order. J.A. 6-7, 21. A petition for a writ of certiorari seeking review of that judgment is pending as *Barger* v. *Petroleum Helicopters, Inc.*, No. 91-284.

ants, the court indicated, was a "self-inflicted" result of their decision "to ignore their rights and responsibilities" under 33 U.S.C. 933(g). J.A. 18-19.

The court also rejected the Director's claim that his interpretation was necessary to give significance to the requirement in Section 33(g)(2), 33 U.S.C. 933(g)(2), that an employee must give notice to his employer of any settlement with or judgment against a third party—a requirement the Director thought would be rendered superfluous if the employer had to approve in advance settlements that were for less than the compensation entitlement. The court found that the notice requirement would not be rendered superfluous because it applies to judgments as well as to settlements, and also applies to settlements for *more* than the claimant's compensation entitlement, while the approval requirement applies only to settlements for *less* than the compensation entitlement. J.A. 19-20.

Three judges dissented. J.A. 22-29. They found the Director's interpretation of "person entitled to compensation" reasonable and entitled to deference. In particular, the dissent discerned no valid reason why an employee who has been denied compensation must "go hat in hand to the employer and request permission to settle his claim." J.A. 26. The dissent also found no evidence that Congress intended to overrule the Director's construction of the statute when it added Section 33(g)(2) in the 1984 LHWCA amendments; rather, the dissent interpreted the reenactment of the phrase "person entitled to compensation" as approval of prior interpretations of that phrase. The dissent also agreed with the Director that Section 33(g)(2)'s notification requirement "adds to the force of the Director's con-

struction" by requiring notification but not approval regardless of whether compensation is being paid. J.A. 28.

SUMMARY OF ARGUMENT

Section 33(g) of the LHWCA requires a "person entitled to compensation" to obtain the employer's prior, written approval of any settlement with a third party for an amount that is less than the LHWCA compensation benefits due. If he does not, he forfeits his rights to deficiency compensation and medical benefits under the LHWCA. 33 U.S.C. 933 (g). Because the claimant's third party recovery serves to offset the employer's compensation liability, the approval requirement "protects the employer against his employee's accepting too little for his cause of action against a third party." *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968). The court of appeals held that the phrase "person entitled to compensation" embraces all persons eligible for LHWCA benefits, whether or not they are receiving those benefits at the time of the third party settlement. Petitioner contends that Section 33(g)'s approval requirement is limited to claimants who are receiving benefits or who have been determined to be entitled to them. In our view, the court of appeals' interpretation is correct.[6]

A. The court of appeals' construction is based on the unambiguous language of the LHWCA. Section

[6] The Director sided with petitioner in the proceedings below. Prior to the panel's ruling, the interpretation advanced by the Director had been upheld in two unpublished decisions. See *O'Leary* v. *Southeast Stevedoring Co.*, 622 F.2d 595 (9th Cir. 1980) (Table); *Kahny* v. *OWCP*, 729 F.2d 777 (5th Cir. 1984) (Table). In light of the en banc decision in this case, the Department of Labor reexamined its views on the issue.

33(g)(1) applies to any "person entitled to compensation" who settles a third party claim for less than the compensation to which he "would be entitled"; actual receipt of payments is not a condition for application of the approval requirement. Section 33(g)(2) states that if the approval requirement under Section 33(g)(1) is not satisfied, "all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." 33 U.S.C. 933(g)(2). The text makes clear that the approval requirement, and forfeiture sanction for failure to comply with it, apply to all eligible claimants who settle third party suits for less than the compensation due, whether or not they were receiving payments or held to be entitled to them at the time of the settlement. That reading of the statute is supported by Section 33 as a whole and by the use of the phrase "person entitled to compensation" in other parts of the LHWCA.

B. The legislative history confirms the natural reading of Section 33(g). As originally enacted in 1927, a "person entitled to compensation" under Section 33 would not be receiving benefits at the time of settlement because claimants were required to elect between compensation and tort remedies. Subsequent amendments abolished the election requirement, but gave no hint of excluding from the phrase "person entitled to compensation" claimants who were not being paid benefits at the time of a third party settlement.

In 1977, the Benefits Review Board ruled that the prior approval requirement in Section 33(g) did not apply to a claimant who had not been awarded and

was not being paid benefits at the time of settlement. In the early 1980s, bills were introduced that would have overruled the Board's construction. This legislative effort culminated in 1984, when Congress enacted a bill amending Section 33 to make clear that the approval requirement and the forfeiture sanction apply to a claimant "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter."

C. Finally, the policies of the LHWCA do not justify a departure from the statute's unambiguous text. This Court has held that the LHWCA should be construed to avoid needlessly harsh results for claimants, but that principle does not override the necessity to adhere to clear statutory language. Moreover, the LHWCA embodies a compromise between the interests of employers and claimants. The court of appeals' holding, by furthering the purpose of the approval requirement to protect employers against unreasonable third party settlements, is consistent with the balance struck in the text of Section 33(g).

ARGUMENT

A CLAIMANT FORFEITS HIS RIGHT TO FUTURE BENEFITS UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT BY FAILING TO OBTAIN HIS EMPLOYER'S PRIOR WRITTEN APPROVAL OF A SETTLEMENT WITH A THIRD PARTY FOR LESS THAN THE COMPENSATION DUE

The LHWCA sets forth a comprehensive scheme governing the entitlement of injured longshoremen and harbor workers to compensation and medical benefits. The statute uses the phrase "person entitled to compensation" in a general sense to identify the class of persons eligible for benefits under the LHWCA. In Section 33(g), the phrase describes the class of persons who must obtain the approval of the employer before reaching any settlement with a third party that would leave the employer liable for deficiency compensation payments. The court of appeals correctly held that Section 33(g)'s approval requirement applies to all eligible claimants who settle for less than the compensation due, regardless of whether they are actually receiving benefits or whether the employer has acknowledged their entitlement to benefits.

A. The Language Of Section 33 Indicates That A "Person Entitled To Compensation" Includes A Claimant Whether Or Not He Has Been Receiving Or Awarded Benefits

Section 33 of the LHWCA defines the relationship between the compensation liability of an employer and the right of a claimant to recover from a third party. 33 U.S.C. 933. Under Section 33(a), a "person entitled to [LHWCA] compensation" is not required to make an election of remedies between a

LHWCA workers' compensation remedy and a third party damages remedy. Under Section 33(f), if "the person entitled to compensation" recovers amounts from a third party because of a compensable injury or death, the employer "shall be required to pay as compensation" only the excess of the LHWCA compensation over the net amount recovered from the third party. Section 33(g) deals with compromises by the claimant of the third party action. Section 33(g)(1) provides:

> If the person entitled to compensation (or the person's representative) enters into a settlement with a third person * * * for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

Section 33(g)(2) explains the consequences of failing to obtain the employer's written approval.

> If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

1. The unambiguous language of the LHWCA supports the court of appeals' conclusion that a "person entitled to compensation" means a person who is eligible for compensation under the requirements of the Act, whether or not he is receiving or has been awarded benefits at the time of settlement. Under Section 33(g)(1), the prior-approval requirement applies whenever "the person entitled to compensation * * * enters into a settlement with a third person * * * for an amount less than the compensation to which the person * * *would be entitled* under this chapter." 33 U.S.C. 933(g)(1) (emphasis added). The phrase "would be entitled" suggests applicability to a person who is not receiving LHWCA benefits, but who would be eligible for them.

Section 33(g)(2) confirms that the approval requirement is intended to apply to all eligible claimants who settle third party claims for less than the compensation due, without regard to whether they are receiving benefits at the time of settlement. The provision states:

> If no written approval of the settlement is obtained and filed as required by paragraph (1), * * * all rights to compensation and medical benefits under this chapter shall be terminated, *regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.*

33 U.S.C. 933(g)(2) (emphasis added). The provision clearly indicates that the approval requirement, and the forfeiture sanction for failing to satisfy it, are applicable to claimants "regardless

of whether" they are receiving benefits at the time of the settlement.

The use of the phrase "person entitled to compensation" in other parts of Section 33 also supports the view that the phrase includes claimants who are eligible for benefits as well as those who are actually being paid. Under Section 33(a), when there is an injury or death for which compensation "is payable," the claimant may also seek damages from a third party; the right to pursue a third party claim is not limited to persons who are actually being paid compensation.[7] Under Section 33(f), when a "person entitled to compensation" recovers from a third party, the employer is liable only for the excess of the compensation due over such recovery. The claimant's status as a "person entitled to compensation" under that provision does not turn on whether he was being paid benefits at the time of the third party recovery.[8]

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[7] Section 33(b), 33 U.S.C. 933(b) provides that if "the person entitled to compensation" accepts compensation under an administrative award and does not bring a claim against the third party within six months, the right to seek damages from the third party is assigned to the employer; if the employer fails to sue in 90 days, the claim reverts to the claimant. The "person entitled to compensation" covered by that provision thus is an actual recipient of benefits, but that is because Section 33(b) establishes an outer time limit for bringing suit before the right to sue is assigned as a matter of law for 90 days to the employer. A "person entitled to compensation" may also sue a third party before seeking benefits. 33 U.S.C. 933(a).

[8] If a person who was not receiving benefits at the time of the third party recovery were deemed not to be a "person entitled to compensation" under Section 33(f), it would allow double compensation for claimants who first recover from a third party and then obtain compensation under the LHWCA. The Board has rejected that possibility. See *Force* v. *Kaiser Aluminum and Chemical Corp.*, 23 Ben. Rev. Bd. Serv. (MB) 1, 4 (1989) (status as a "person entitled to compensation" under Section 33(f) does not depend on receiving benefits at the time of the third party recovery), aff'd in relevant part *sub nom. Force* v. *Director, OWCP*, 938 F.2d 981, 984 (9th Cir. 1991) (agreeing with the Director that "[t]he only relevant question is whether the claimant is impermissibly recovering twice for the same injury, regardless of when such payments occur"); see also S. Rep. No. 428, 86th Cong., 1st Sess. 2 (1959) (while a claimant need not elect between LHWCA compensation and seeking recovery from a third party, a claimant "would not be entitled to double compensation").

It is particularly appropriate to read the phrase "person entitled to compensation" as having the same meaning in both Section 33(f) and Section 33(g) because those provisions work in tandem to limit the employer's LHWCA liability when a third party has been or should have been held accountable.[9]

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[9] Section 33(f) explicitly makes the employer liable for compensation as offset by the amount of the third party recovery. As construed by the courts, the statute also gives the employer a lien on the third party recovery so that the employer can recoup benefits already paid. See *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. 74, 80-81 & n.6 (1980); *Ochoa* v. *Employers Nat'l Ins. Co.*, 754 F.2d 1196, 1198 (5th Cir. 1985). Section 33(g) protects the employer's offset and lien interests by terminating the employer's deficiency liability under subsection (f) when the employer has not approved a settlement with the third party that the claimant may desire, but that may be unreasonably low. See *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968) (holding that acceptance of remittitur is not a "compromise" under Section 33(g); the provision "protects the employer against his employee's accepting too little for his cause of action against a third party" and "[t]hat danger is not present" when damages are set "by the independent evaluation of a trial judge"). In *Banks*, the employee had settled the third party action *before* the entry of the award of LHWCA compensation, 390 U.S. at 461, but there was no suggestion that Section 33(g) was inapplicable for that reason.

Moreover, the phrase "person entitled to compensation" is used elsewhere in the LHWCA to apply specifically to claimants who are not receiving benefits. For example, under Section 14(h), a deputy commissioner is required to conduct an investigation and to hold a hearing when "any person entitled to compensation" gives notice "in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended." 33 U.S.C. 914(h). That provision expressly treats a claimant who is *not* receiving benefits and who has *not* obtained an award as a "person entitled to compensation."

The "normal rule" is that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986); *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2504 (1990). That principle has been applied specifically in construing the LHWCA. *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 633 (1983) ("Since we have often stated that a word is presumed to have the same meaning in all subsections of the same statute, * * * we would expect the term 'wages' to maintain the same meaning throughout the [LHWCA]."). The context in which the phrase "person entitled to compensation" is used throughout the Act, and in Section 33 in particular, indicates that it consistently covers claimants who are eligible for compensation, whether or not they are actually receiving it.

2. Petitioner acknowledges (Br. 4) that Cowart was "entitled" to receive compensation from his employer at the time he settled his third party claim. Petitioner nevertheless contends (Br. 6-7, 18-23) that the phrase "person entitled to compensation" in Section 33(g)(1) is limited to claimants receiving benefits or judicially determined to be entitled to them—the meaning the Board advanced before Congress added Section 33(g)(2) to the statute and then adhered to after the 1984 amendments. In so arguing, petitioner, like the Board, treats Section 33(g)(1) as entirely distinct from Section 33(g)(2).[10] That interpretation is untenable.

If the only individuals required to obtain employer approval were those to whom the employer had made payments or who had been determined to be entitled to benefits (as the Board had thought), it would have been pointless for Congress to state that the failure to obtain the required approval results in a forfeiture "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." Under petitioner's reading of the statute, the only persons who could be subject to forfeiture for not obtaining approval were those receiving payments from the employer or found to be entitled to payments. Section 33(g)(2), however, clearly contemplates that the forfeiture sanction applies to all claimants who fail to get the required aproval whether or not payments had been made or entitlement acknowledged.[11]

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[10] See *Dorsey*, 18 Ben. Rev. Bd. Serv. at 29 ("We do not view this new phrase [the "regardless" clause] in subsection 33(g)(2) as modifying the written approval requirement of subsection 33(g)(1). Rather, we view subsections 33(g)(1) and 33(g)(2) of the amended Act as separate provisions applicable to separate situations").

[11] Petitioner also argues (Br. 20-22) that Congress intentionally referred to the individual required to give notice of a third party settlement or judgment as an "employee" in Section 33(g)(2) to distinguish him from a "person entitled to compensation" subject to the approval requirement in Section 33(g)(1). From that questionable premise, petitioner main-

Petitioner argues (Br. 20-23) that under Section 33(g), approval of a settlement is required when the claimant is receiving benefits, but only notice is required when the employee is not receiving benefits. He urges that if approval were required of both classes of claimants, the notice requirement would be superfluous. Not so. Section 33(g)(2) provides that if an employee fails to give notice of any settlement or judgment with a third person, the sanction of forfeiture of rights under the statute is applicable. 33 U.S.C. 933(g)(2). On its face, the notification requirement applies to *all* settlements, whereas the approval requirement applies only to settlements for less than the LHWCA compensation entitlement. 33 U.S.C. 933(g)(1). Accordingly, notice (but not approval) is required when the settlement is for more than the LHWCA compensation entitlement.[12]

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tains that Congress intended to preserve the Board's earlier definition of the phrase "person entitled to compensation." That contention is unfounded. The "regardless" clause applies both to an "employee" who fails to give notice and a "person entitled to compensation" who fails to obtain approval. It therefore reflects Congress's intention that a "person entitled to compensation" can become subject to forfeiture under Section 33(g)(2) "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter."

[12] The forfeiture sanction would not be meaningless for a claimant who fails to give notice of a settlement for more than the LHWCA compensation. Even though such a claimant would not be entitled to further compensation payments, the employee who fails to give notice would forfeit his entitlement to future medical benefits. See *Bethlehem Steel Corp.* v. *Mobley*, 920 F.2d 558 (9th Cir. 1990). In addition, notice (but not approval) of a settlement may be required when a claimant's full third-party settlement is worth more than the LHWCA compensation, but the net settlement (after deducting reasonable expenses and attorneys' fees, 33 U.S.C. 933(f)) is worth less. The forfeiture sanction applied to such a claimant would terminate deficiency compensation rights as well as medical benefits. Although petitioner is such a claimant, petitioner has not contended that employer approval was not required for that reason.

At bottom, petitioner's argument simply rewrites the statute to say that Section 33(g) requires "*written approval* from an employer who was *paying* compensation; and only *notification* to an employer who was *not paying* compensation." Pet. Br. 10 (emphasis in original). The LHWCA, however, does not say this. The court of appeals was therefore correct in concluding that the language of Section 33 is unambiguous in requiring claimants to obtain employer approval of settlements with third parties for less than the compensation due, regardless of whether the employer has actually paid benefits or acknowledged the claimant's entitlement to benefits at the time of the settlement.

B. The Legislative History Confirms That Section 33(g)'s Approval Requirement Applies To All Claimants Who Compromise Third-Party Claims For Less Than The Compensation Due

Because Section 33(g) unambiguously requires claimants to obtain prior written approval of settlements whether or not they are being paid compensation at the time, there is a "'strong presumption' that the plain language of the statute expresses congressional intent," which "is rebutted only in 'rare and exceptional circumstances,' * * * when a contrary legislative intent is clearly expressed." *Ardestani* v. *INS*, 112 S. Ct. 515, 520 (1991); *King* v. *St. Vincent's Hosp.*, 112 S. Ct. 570, 575 n.14 (1991) ("When we find the terms of a statute unambiguous,

judicial inquiry is complete, except in rare and exceptional circumstances."). Although resort to legislative history is unnecessary here, that history in fact confirms the construction of Section 33(g) suggested by the plain language of the statute.

1. *The History of the LHWCA Before the 1984 Amendments Does Not Support a Narrow Construction of the Phrase "Person Entitled To Compensation"*

The LHWCA was enacted in 1927. Act of Mar. 4, 1927, ch. 509, 44 Stat. 1424. It initially required a "person entitled to compensation" to elect between accepting compensation and seeking damages from a third party. Section 33(a), 44 Stat. 1440. Acceptance of compensation resulted in an automatic assignment of the claimant's rights against the third party to the employer. Section 33(b), 44 Stat. 1440. If the "person entitled to compensation" did sue a third party, he retained the right to be paid compensation by the employer in excess of the third party recovery. Section 33(f), 44 Stat. 1441. However, if the "person entitled to compensation" compromised the third party action for less than the compensation due, the employer remained liable "only if such compromise is made with his written approval." Section 33(g), 44 Stat. 1441. See *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 454 n.18 (1947). Because of the election requirement, the claimant who settled such a case could not be receiving compensation while he was suing a third party. Accordingly, a "person entitled to compensation" under Section 33 originally included only those claimants who were not receiving compensation.

Because the LHWCA was modeled on New York's workers' compensation law, *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 466 (1968), this

Court has sometimes consulted New York authority in interpreting the LHWCA. See, *e.g.*, *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 275 (1980). Under the New York analogue to Section 33 of the LHWCA, see 1922 N.Y. Laws ch. 615, § 29, as amended by 1924 N.Y. Laws ch. 499, the requirement of employer approval of a third party settlement was excused in some cases where the employer had controverted the claimant's entitlement to compensation.[13] Although those decisions are consistent with petitioner's approach in this case, they were not based on a construction of the phrase "person entitled to compensation," and there is no evidence that Congress was aware of them. Moreover, the New York authorities rested on the theory that estoppel could bar an employer from relying on his failure to give approval. Congress rejected estoppel theories under Section 33(g) in the 1972 amendments to the LHWCA (see pp. 22-23, *infra*).

In 1959, Congress abolished the requirement that an LHWCA claimant must elect between receiving compensation and pursuing a claim against a third party. Pub. L. No. 86-171, 73 Stat. 391 (1959).[14]

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[13] See *Beekman* v. *W.A. Brodie, Inc.*, 249 N.Y. 175, 176, 163 N.E. 298, 298 (1928) (employer was estopped from asserting the right to written consent "when it disclaimed liability and advised the employee to settle his case with the third party"); *State of New York Dep't of Labor Special Bulletin* No. 156, at 276 (Jan. 1927-Aug. 1928) (state agency ruled that a carrier who disclaimed interest in the third party case could not later object to the amount of the settlement), aff'd mem. *Clow* v. *B.F. Keith's Fordham Theater*, 221 A.D. 826, 224 N.Y.S. 774 (1927), aff'd mem., 247 N.Y. 583, 161 N.E. 191 (1928).

[14] Congress had previously limited the election requirement to cases in which compensation was being paid pursuant to an award by a deputy commissioner. Act of June 25, 1938, ch. 685,

That change was designed to relieve the "hardship" faced by injured employees whose need to meet immediate expenses led them to accept compensation rather than pursue an uncertain recovery in a third party lawsuit. S. Rep. No. 428, 86th Cong., 1st Sess. 2 (1959). Although the 1959 amendments permitted the employee to take compensation while suing a third party, they did not restrict to that one situation the requirement that an employer must approve third party settlements for less than the compensation due.[15]

In 1972, the LHWCA was extensively amended. Pub. L. No. 92-576, 86 Stat. 1251. One of the provisions amended Section 33(g) to overrule decisions that had applied an estoppel theory to prevent em-

§§ 12, 13, 52 Stat. 1168. See *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. at 79-81 (describing 1938 and 1959 amendments).

[15] Petitioner argues (Br. 11-14) that the intent of the 1959 amendments would be frustrated if employer approval of settlements were required when the employer is not paying benefits. Petitioner claims that such a rule would allow an employer who was not paying benefits to withhold approval of a settlement for less than the compensation due; the claimant would nevertheless be forced to accept the settlement because of the need for funds to meet daily expenses. Br. 14-15. It is not true, however, that whenever the employer is not paying compensation benefits, the claimant will be forced to settle a third party claim because of an immediate need for funds. In this case, for example, Cowart initially received temporary disability payments and later returned to work before settling his third party claim. There is no suggestion that his settlement was compelled by pressing financial needs. Moreover, there is no evidence that Congress believed that the difficulties petitioner foresees would in fact flow from the approval requirement; the Senate report assumed that an employee's "compensation under the act is certain." S. Rep. No. 428, *supra*, at 2. See also *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. at 86 ("The compensation award was intended to be an immediate and readily available payment to the injured longshoreman.").

ployers from relying on the approval requirement when they had not in fact given written approval of a third party settlement. § 15(h), 86 Stat. 1262.[16] In rejecting such holdings, the committee reports explained that the "amendment makes it clear precisely what written approval the person entitled to benefits must obtain and file with the deputy commissioner." S. Rep. No. 1125, 92 Cong., 2d Sess. 14 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 12 (1972). See *Devine* v. *National Creative Growth, Inc.*, 16 Ben. Rev. Bd. Serv. (MB) 147, 152-153 (1982) (amendment was "intended to preclude application of estoppel, substantial compliance, and similar theories to avoid the effect of non-compliance with Section 33(g)").[17] The amendment thus strengthened the requirement of employer approval of settlements for less than the amount of the LHWCA liability; it does

[16] Before the 1972 amendments, the LHWCA stated that the employer would be liable "only if such compromise is made with [the employer's] written approval." 33 U.S.C. 933(g) (1970). The 1972 amendments provided that written approval had to be "obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made." Pub. L. No. 92-576, § 15(h), 86 Stat. 1262.

[17] In *Devine*, the Board held that the fact that the carrier for the workers' compensation claim had participated in the settlement of the third party action and had executed the settlement agreement did not render the formalities of Section 33(g) inapplicable. In *ITO Corp.* v. *Sellman*, No. 90-1531 (4th Cir. Jan. 22, 1992), which presented similar facts to those in *Devine*, the court upheld the Board's decision that Section 33(g) was inapplicable. This case does not involve the issue addressed in *Devine* and *ITO Corp.*

not support a reading of Section 33 that would exclude claimants who are not receiving compensation at the time of the settlement.

2. *The 1984 Amendments Applied the Approval Requirement and Forfeiture Sanction to a Settling Claimant Regardless of Whether the Employer Had Made Payments or Acknowledged Entitlement to Benefits*

a. Following the 1972 amendments, the Benefits Review Board ruled that the prior approval requirement of Section 33(g) did not apply to a claimant who was not receiving benefits under the Act when he settled a third party claim. In *O'Leary* v. *Southeast Stevedoring Co.*, 7 Ben. Rev. Bd. Serv. (MB) 144 (1977), aff'd mem., 622 F.2d 595 (9th Cir. 1980), the Board acknowledged that the 1972 amendments were designed to "strengthen" the approval requirement, 7 Ben. Rev. Bd. Serv. at 147, but nevertheless held that the LHWCA envisioned that an employer would be making payments (or would have been found liable to do so by a judicial determination) in order to derive rights under Section 33. *Id.* at 148. The Board explained that a contrary interpretation

> could result in a claimant not being paid any compensation, yet the claimant would be afraid to make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without [the] employer's consent to obtain money (the Act providing no procedure for waiving employer's consent unlike some state acts).

Id. at 149. The Board stated that "Congress by requiring written consent could not have contemplated such a result." *Ibid.*

b. The LHWCA was amended again in 1984. Pub. L. No. 98-426, 98 Stat. 1639 (1984). The major impetus for the 1984 amendments was employer dissatisfaction with the LHWCA. See, *e.g.*, *Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act: Hearings before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. (1979) [hereinafter *House Hearings*].

The first version of Section 33(g)(2) seems to have appeared shortly after the Ninth Circuit's unpublished affirmance in *O'Leary*. See H.R. 7610, § 21(c), 96th Cong., 2d Sess. (1980), *reprinted in* Supplement to *House Hearings*, *supra*, at 43-44.[18] Representative Erlenborn, the sponsor of this bill and a critic of the Longshore program, see 126 Cong. Rec. 15,438 (1980), explained the amendment as

> Requiring an employee, who enters into a settlement with a third party for an amount less than compensation otherwise payable, to obtain the employer's and carrier's approval; [and]
>
> Relieving the employer of his obligations to pay future compensation where a settlement is reached and the employee fails to inform, and win the approval of, the employer-carrier of such settlement, or where the employee fails to notify the employer of any third party judgment in his favor.

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[18] The bill provided that "[i]f no written approval of the settlement is obtained and filed as required by paragraph (1) [Section 33(g)(1)], or if the employee fails to notify the employer of any judgment obtained from a third person, and regardless of whether the employer or its insurer has made payments or acknowledged entitlement to the benefits of this Act, all rights to compensation under this Act shall be terminated."

Supplement to *House Hearings*, *supra*, at 56. "The thrust of [the] amendments to subsection (g)," according to Representative Erlenborn, "is to preserve the employers' compensation lien on amounts received from a third party, where the employee either enters into a secret settlement with the third party or fails to notify the employer of a third party award." *Ibid.* The language of the proposed bill had the effect of overruling *O'Leary*.

In 1981, an identical amendment to Section 33(g) was introduced in the Senate. See 127 Cong. Rec. 9835 (1981). In a hearing on that bill, the Chairman of the Benefits Review Board specifically brought to the legislators' attention the holding of *O'Leary* that "the approval of the employer is not required if employer has refused to pay any compensation under the Act." The Chairman observed that the bill under consideration would reverse that result by requiring approval "even if employer has refused to pay claimant any compensation" and that this could "lead to injustice." *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. 209, 210 (1981) (statement of Samuel Smith) [hereinafter *Senate Hearings*]. The Chairman did not defend *O'Leary*, however, but suggested that Congress should provide for approval of settlements by "an impartial party, such as the deputy commissioner." *Id.* at 210-211.[19]

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[19] A claimants' representative urged Congress to *change* the existing law to ensure that a claimant need not obtain employer approval of a third party settlement when the employer refuses to pay compensation. See *Senate Hearings*, *supra*, at 396 (Thomas Gleason, president of the International Longshoremen's Association, criticized "the present enactment," stating that "[a] more realistic amendment is needed to provide that if the employer refuses to pay, then the claimant can settle with the third party without employer authorization"); see also *Oversight on the Longshoremen's and Harbor Workers' Compensation Act, 1980: Hearing Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 383 (1980) (same). It is unclear whether the claimants' spokesman realized that *O'Leary* provided for that result; in any event, no language was adopted to achieve the result the claimants desired.

Instead of adopting the Chairman's suggestion, the Senate subcommittee tightened the amendment to Section 33(g) to clarify the breadth of the forfeiture provision.[20] The Senate Report explained that the amendment would "assure that all entitlement to compensation and other benefits otherwise available under this Act is forfeited whenever a third-party action is resolved without the employer's formal written approval." S. Rep. No. 498, 97th Cong., 2d Sess. 44 (1982). The Senate passed that provision without debate, 128 Cong. Rec. 18,019, 18,023 (1982), but the bill died in the House.

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[20] The revised bill changed the language of S. 1182 as introduced (quoted in note 18, *supra*) in three ways. See S. 1182, § 19(c), 128 Cong. Rec. 18,023 (1982). First, it moved the "regardless" clause to the end of Section 33(g)(2)—removing any doubt that the "regardless" clause applied both to failures to meet the notice requirement and to failures to meet the approval requirement. Second, it required notification of "any settlement" as well as of any judgment. Third, it provided that rights to medical benefits as well as to compensation would be forfeited. The relocation of the "regardless" clause is inconsistent with any suggestion that Congress intended to preserve *O'Leary* by applying the notification requirement to settlements. The revised bill's language is identical to Section 33(g)(2) as enacted.

In 1983, the Senate again passed legislation that incorporated the language amending Section 33(g). In 1984, the House followed suit. See 129 Cong. Rec. 16,248, 16,251 (1983); 130 Cong. Rec. 8317, 8321, 8515 (1984). The House Report explained that the change ensured that "if a claimant who has brought a cause of action against a third party enters into a settlement in an amount less than the amount to which the claimant would be entitled under the Longshore Act, the employer shall be responsible for additional compensation only if the employer has approved the settlement agreement." H.R. Rep. No. 570, 98th Cong., 1st Sess. Pt. 1, at 30-31 (1983).[21]

c. This legislative record provides no support for petitioner's theory (Br. 23) that Congress intended "to retain" *O'Leary's* definition of "person entitled to compensation" when it reenacted that phrase in 1984.[22] Congress did not "re-enact[] a statute with-

[21] The Senate Report repeated the explanation of the amendment given in S. Rep. No. 498, *supra*, at 44. See S. Rep. No. 81, 98th Cong., 1st Sess. 45 (1983). There was no floor debate on the provision, and the Conference Report is unenlightening. See H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 36 (1984) (in discussing other changes to Section 33, the Senate bill is summarized as "terminat[ing] the employer's liability for payment of compensation and medical benefits if the employee fails to notify the employer of any settlement obtained from a [*sic*] judgment rendered against a third party").

[22] When Congress acted, the *O'Leary* construction had been upheld in only two judicial decisions, both of which were unpublished. See *O'Leary*, *supra*; *Kahny* v. *OWCP*, *supra*. There is no basis for interpreting Congress's reenactment as automatic endorsement of that rarely litigated construction. Cf. *United States* v. *Mendoza-Lopez*, 481 U.S. 828, 836 (1987) ("[W]hile there was, at the time of the enactment * * *, some case law suggesting that a collateral attack on a deportation proceeding might under certain circumstances be permitted, that principle was not so unequivocally established as to persuade us that Congress must have intended to incorporate that prior law into [the statute]."). Moreover, *O'Leary's* reading of the phrase "person entitled to compensation" was, at the very least, in tension with the text of the LHWCA. When an administrative construction is contrary to the statutory text, a "subsequent re-enactment does not constitute an adoption of a previous administrative construction." *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991).

out change," *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), when it amended Section 33(g) in 1984. Rather, it substantially changed that section—with the effect of clarifying that the forfeiture sanction for failing to obtain employer approval applies "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." 33 U.S.C. 933 (g)(2). The explanation given for that change suggests that the approval requirement was understood as applying to *all* eligible claimants who settle third party actions for less than the compensation due.

A Department of Labor regulation implementing the 1984 amendments reflects the same reading of the statute. The regulation states that the employer's prior written approval is required when a "claim or legal action instituted against a third party results in a settlement agreement which is for an amount less than the compensation to which a person would be entitled" under the LHWCA, and that failure to obtain that approval "relieves the employer * * * of liability for compensation * * * and for medical benefits otherwise due * * *, regardless of whether the employer or carrier has made payments o[r] acknowledged entitlement to benefits under the Act." 20 C.F.R. 702.281(b). The regulation accords with

the interpretation adopted by the court of appeals. While the Board has adhered to its *O'Leary* ruling despite the 1984 amendments, see J.A. 54-57, and the Director had endorsed its rulings, "the Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts." *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. at 278 n.18; cf. *Martin* v. *Occupational Safety and Health Review Comm'n*, 111 S. Ct. 1171 (1991).[23]

In sum, before Congress amended Section 33 in 1984, legislators were told that the proposed bill would overrule *O'Leary*. The amendment was nevertheless passed with language that clarified that consequence. In light of that history, there is no basis for substituting the Board's construction of Section 33(g) in *O'Leary* for the language that Congress enacted.

C. The Policies Underlying The Longshore Act Are Consistent With The Court of Appeals' Holding

O'Leary's holding was grounded in a policy concern: the Board sought to avoid the potential hardship to claimants if an employer contested its LHWCA liability, yet refused to consent to the claimant's effort to settle a third party claim. That

[23] The Director, who does have policymaking responsibility, issued a circular (through his designee) to all district compensation offices stating that he would support as "a rational approach" the Board's view that under Section 33(g), a "person entitled to compensation" is a person receiving LHWCA compensation at the time of a third party settlement. The circular acknowledged, however, that "the Board's position may not be totally consistent with the amended language of Section 33(g)." See LHWCA Circular No. 86-3, at 1 (May 30, 1986).

possibility is a legitimate source of concern, but it does not justify departure from the statute's unambiguous text. Moreover, the court of appeals' reading of the statute is consistent with the primary purpose of Section 33(g)—to protect an employer against an unreasonably low settlement by a claimant.

1. *The Longshore Act's Policies Do Not Justify Disregarding Clear Statutory Language*

This Court has noted that because the LHWCA's basic goal is to provide compensation to injured workers, it "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953); accord *Director, OWCP* v. *Perini North River Assoc.*, 459 U.S. 297, 315-316 (1983); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977). That principle is applicable to Section 33(g). See *Bell* v. *O'Hearne*, 284 F.2d 777, 781 (4th Cir. 1960) ("In the absence of language plainly demanding it, a construction [of Section 33(g)] is not to be favored which visits a forfeiture on the employee or his dependent and gives a windfall to the insurance carrier.").

No statute, however, pursues its principal purpose at all costs; each statute reflects compromises embodied in the language of the law. See *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2676 (1990). "Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Board of Governors, Federal Reserve System* v. *Dimension Financial*

Corp., 474 U.S. 361, 374 (1986). For that reason, the Court has remarked that "the wisest course [in construing the LHWCA] is to adhere closely to what Congress has written." *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 617 (1981).

2. *The Court of Appeals' Application of the Approval Requirement Accords with the Balance of Competing Policies Reflected in the Statute*

The court of appeals' interpretation is consistent with the compromises underlying the Longshore Act. The LHWCA is "not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other." *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. at 636; *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. at 282 ("the LHWCA represents a compromise between the competing interests of disabled laborers and their employers"). Like other parts of the LHWCA, Section 33 embodies such a balance.

Section 33 furthers the claimant's interest in recovering from a third party by providing that a person entitled to compensation does not have to elect between a tort remedy and a compensation remedy, but may pursue both. It protects the employer's interest by providing a lien on the net third-party recovery so that the employer may recoup compensation already paid, see note 9, *supra*; by reducing the employer's liability by the amount of the net third party recovery; and by providing that a claimant's settlement of a suit against a third party for less than the amount of compensation requires employer approval.

As this Court has explained, the approval requirement "protects the employer against his employee's accepting too little for his cause of action against a third party." *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. at 467; see also *Morauer & Hartzell, Inc.* v. *Woodworth*, 439 F.2d 550, 552 (D.C. Cir. 1970) (per curiam) (approval requirement protects against prejudice to the employer), cert. dismissed, 404 U.S. 16 (1971); *Bell* v. *O'Hearne*, 284 F.2d at 780 ("It is the evident purpose of the provision to prevent an employee or his beneficiaries to manage independently the course of pending litigation or to affect prospective litigation that is designed for the use of the employer as well as the employee or his dependents."); *Dorsey* v. *Cooper Stevedoring Co.*, 18 Ben. Rev. Bd. Serv. (MB) 25, 27-28 (1986) ("The purposes of Section 33(g) are to ensure that employer's rights are protected in a third party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. § 933(b)-(f)."), appeal dismissed, 826 F.2d 1011 (11th Cir. 1987).

The court of appeals' construction of Section 33(g) furthers that purpose. If the phrase "person entitled to compensation" were limited to those claimants who were already receiving compensation at the time of the settlement, it would deny the right of prior approval of settlements with third parties to those employers who exercise their statutory right to controvert liability. See 33 U.S.C. 914(a). It would also deny that protection to employers who were not notified of a compensable death or injury before the claimant settled the claim against the third party.[24] Application of the approval require-

[24] In certain occupational disease cases, employees or their survivors need not notify the employer of a compensable

ment to eligible claimants, regardless of whether they are actually being paid, thus furthers the employer-protection goal of the approval provision.

This is not to deny that there are situations in which the court's construction will lead to hardship for claimants. As the Board suggested in *O'Leary*, some claimants may be compelled by pressing financial needs to accept third party settlements without employer consent, and thereby lose their rights to compensation.[25] Employers who are not paying benefits may withhold consent for reasons other than the desire to prevent an unreasonably low settlement. See 2A A. Larson, *The Law of Workmen's Compensation* § 74.17(d), at 14-420 (1990) (recognizing the possibility that employers may unreasonably refuse to approve claimants' tort settlements).[26]

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death or injury until a year after they become aware of the relationship between the employment, the disease, and the death or injury. 33 U.S.C. 912(a).

[25] The LHWCA does, however, provide incentives for an employer to pay benefits promptly. An employer is required to pay compensation without an award, and its liability is increased by 10% if it does not pay or contest eligibility within 14 days of notice of death or disabling injury. 33 U.S.C. 914(a) and (e). If the employer contests, the claimant may file a claim and, if successful obtain an award from a deputy commissioner, or, if a hearing is held, from an ALJ. 33 U.S.C. 919. Those awards may be enforced in district court. 33 U.S.C. 918. If the employer does not pay an award within ten days after it becomes due, the employer's liability is increased by 20%, unless the Board or a court stays payment. 33 U.S.C. 914(f). Stays are not granted unless the employer establishes that payment will take all of its property or will render it incapable of carrying out its business—a difficult standard to meet. See *Rivere* v. *Offshore Painting Contractors*, 872 F.2d 1187, 1191 (5th Cir. 1989).

[26] This problem exists even when an employer is paying compensation. See *Pinell* v. *Patterson Service*, 22 Ben. Rev. Bd. Serv. (MB) 61, 65-66 (1989) (noting employer's "blanket policy of withholding written approval of third party settlements in order to avoid any further liability under the Longshore Act"). The solution to that problem suggested by Chairman Smith during the Senate subcommittee hearings, which is comparable to the solution adopted by some States, see 2A A. Larson, *supra*, § 74.17(d), at 14-420 to 14-422, is to have a neutral party (such as a deputy commissioner) determine whether a settlement is reasonable and should be authorized. *Senate Hearings*, *supra*, at 210-211; see also *Longshoremen's and Harbor Workers Compensation Act: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. 90 (1982) (claimants' spokesman urged that "[w]here the employer and claimant are unable to reach an agreement that the settlement is reasonable the trial court should be given the opportunity to make a determination as to whether or not the settlement is reasonable and to approve it even over the employer's objections"). Congress, however, has not adopted that approach.

Other difficulties may arise in occupational disease cases. See Postol, *The Federal Solution to Occupational Disease Claims—The Longshore Act and Proposed Federal Programs*, 21 Tort & Ins. L.J. 199, 228, 231 (1986). Occupational disease litigation is often complex and costly, and it may involve multiple third-party defendants with limited assets. *See, e.g.*, *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 419 (J.P.M.L. 1991). Claimants in such cases frequently settle some claims for relatively small amounts that are less than the compensation available under the LHWCA.[27] Although employer approval is required for those settlements, some

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[27] See, *e.g.*, *Blake* v. *Bethlehem Steel Corp.*, 21 Ben. Rev. Bd. Serv. (MB) 49, 51 & n.1 (1988) (settlements net $5,000 to $6,000); *Wilson* v. *Triple A Machine Shop*, 17 Ben. Rev. Bd. Serv. (MB) 471, 472 (ALJ) (1985) (settlements ranging from $750 to $15,000).

claimants may have difficulty even identifying the employer whose consent is required.[28]

These difficulties are admittedly cause for concern, but they do not justify a departure from the clear language of the statute. Some of those difficulties are tempered by a variety of restrictions on the applicability of Section 33(g), which are not at issue in this case.[29] And although occupational disease

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[28] Under the LHWCA, compensation is payable for disability, defined as inability because of injury to earn wages. 33 U.S.C. 902(10). Under the "last employer" rule, applicable to occupational disease cases, full liability for compensation falls on the last employer to expose the employee to substances causing the disability. See *Port of Portland* v. *Director, OWCP*, 932 F.2d 836, 840 (9th Cir. 1991). It is thus possible for a transient employee to become exposed to disease-causing materials while working for one employer, settle a third-party suit arising out of that exposure, and not become disabled and entitled to LHWCA compensation until he suffers further injurious exposure with a yet unknown future employer. A strict application of Section 33(g) could foreclose the employee from receiving LHWCA compensation because of his failure to secure approval of the earlier settlement from that future employer.

[29] For example, claimants will not be subject to Section 33(g)'s approval requirement if they resolve their third-party cases other than through a compromise. See *Banks*, 390 U.S. at 467 (order of remittitur is a judicial determination of recoverable damages, not an agreement subject to Section 33(g)); cf. *Morauer & Hartzell, Inc.* v. *Woodworth*, 439 F.2d at 553 (consent judgment that "was not the result of the judge's independent finding of the value of the claim after full presentation of the evidence, but was at most an informal exploratory attempt to determine the possibilities for private settlement," is subject to Section 33(g)'s approval requirement). In addition, the settlement of a third party claim before the employee becomes disabled may not be subject to the prior approval requirement. See *Bethlehem Steel Corp* v. *Mobley*, 920 F.2d at 560. Finally, employers cannot convert the shield of Section 33(g) into a sword against claimants to recover, after an unconsented third-party settlement, benefits previously paid. See *Stevedoring Servs. of America, Inc.* v. *Eggert*, No. 90-35015 (9th Cir. Jan. 9, 1992).

claimants face many obstacles in recovering against third parties, those difficulties are balanced by provisions, enacted in 1984, that make it easier for such claimants to recover LHWCA benefits.[30]

In the end, Congress's accommodation of these conflicting considerations should not be disturbed by the agency or the courts to correct perceived mistaken policy choices where, as here, "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842; *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 280 (1980) (submission that a construction of the Act would "produce anomalous results that Congress probably did not intend * * * has insufficient force to overcome the plain language of the statute itself"). If modification of Section 33(g) is appropriate, the body to make that change is Congress.

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[30] See Pub. L. No. 98-426, §§ 10-12, 98 Stat. 1647-1649 (1984) (special compensation provisions for such claimants, including retirees, and extended time limits for filing LHWCA claims).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1992

APPENDIX

33 U.S.C. 933 provides:

Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of compensation operating as assignment

Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

(c) Payment into section 944 fund operating as assignment

The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Institution of proceedings or compromise by assignee

Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Recoveries by assignee

Any amount recovered by such employer on account of such assignment, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present

value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) the employer shall pay any excess to the person entitled to compensation or to the representative.

(f) Institution of proceedings by person entitled to compensation

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

(g) Compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a

settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

(3) Any payments by the special fund established under section 944 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a) of this section. Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of whether the Secretary on behalf of the special fund has agreed to or has received actual notice of the settlement or judgment.

(4) Any payments by a trust fund described in section 917 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment recorded against a third person referred to under subsection (a) of this section. Such lien shall have priority over a lien under paragraph (3) of this subsection.

(h) Subrogation

Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) Right to compensation as exclusive remedy

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

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No. 91-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE ESTATE OF FLOYD COWART

Petitioner,

v.

NICKLOS DRILLING COMPANY, and
COMPASS INSURANCE COMPANY

Respondents.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. Extent of Argument.

Due to the overwhelming response Petitioner's argument has garnered in the captioned matter, it is felt that a response to some of the arguments levied in opposition is in order. This reply will be limited to responding to the arguments propounded in the brief of the Federal Respondent, the amicus brief of Petroleum Helicopters, Inc. and American Home Assurance Company (Amicus PHI), and the amicus brief of National Association of Stevedores, Shipbuilder's Council of American, Inc., Master Contracting Stevedore Association of the Pacific Coast, Inc., The Alliance of American Insurers, and Signal Mutual Indemnity Association, Ltd. (Amicus NAS). The argument proposed by Respondent Nicklos Drilling Company and Compass Insurance Company does nothing more than reiterate its argument before the lower courts, i.e., total reliance on the United States Court of Appeals decision in *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644 (5th Cir. 1986). As the *Collier* decision, and its alleged applicability to the captioned matter, has been discussed in detail in Petitioner's Brief on the Merits (Pet.Br., p. 26-28), it need not be re-argued here. Suffice it to say that the facts of Collier are easily distinguishable from the facts of the captioned matter, and that decision is therefore totally reconcilable with Petitioner's position.

By contrast, Federal Respondent, Amicus PHI and Amicus NAS, all introduce new arguments concerning the interpretation of Section 33(g). As these arguments were not specifically addressed in Petitioner's Brief on the Merits, they will be addressed here. Since

the arguments propounded by all of these entities is substantially the same, this reply will address them collectively as "Opposition Argument".

2. Identification of parties.

First, however, Petitioner submits that certain confusing elements should be cleared up prior to the oral argument in this matter. While this matter was being heard before the lower courts, briefs were filed in support of Petitioner's position by Robert P. Davis, Carol A. De Deo, and Joshua T. Gillelan, II, as attorneys for the Director, Office of Worker's Compensation Programs. Before this Court, briefs have been filed by Marshall J. Breger, Allen H. Feldman, Steven J. Mandel and Edward R. Sieger, as attorneys for "Federal Respondent". Since the brief before this Court does not state that the above persons are representing the Director, OWCP, and said brief presents an argument completely inapposite of the argument submitted in the Director's brief before the Fifth Circuit, Petitioner admits confusion as to whether the "Federal Respondent" is advancing the position of the Director, OWCP, or whether it is advancing the position of some other federal agency. This confusion is heightened by the fact that Chapter 3-600, paragraph 9 of the Longshore Procedure Manual (a manual promulgated by the Director, OWCP, for use by OWCP personnel) states:

> "The term entitled to compensation has been interpreted to mean that the employee is being paid by the EC either voluntarily or pursuant to an award of compensation. If the employee is not receiving compensation, Section 33(g)(2) merely requires that the employee give the employer notice of the settlement. . ."
>
> (Supp. App. 1).

As the view promulgated by the Director, OWCP's Procedure Manual is the exact argument that Petitioner has advanced in its Brief on the Merits, and the exact opposite of the argument propounded in the brief of the "Federal Respondent", Petitioner questions whether the "Federal Respondent" is propounding a view of the Director, OWCP which is inapposite to the Director's own enforcement guidelines, or whether the "Federal Respondent" is indeed representing the views of some other federal agency.

The importance of this determination is twofold. First, the Director, OWCP is the only federal agency that is a party in the captioned matter. Thus, if "Federal Respondent" is not representing the views of the Director, OWCP, then this party is indeed not a respondent, but rather an amicus party. In that case, as an amicus, "Federal Respondent" would not be allowed to participate in oral argument of this matter on March 25, 1992. Second, this determination is important to determine the weight to be given to the "Federal Respondent's" argument. The Director, OWCP, by virtue of its being charged with the administration of the LHWCA, is given deference to its interpretation of the Act's provisions. See e.g., *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1046 and n. 23 (5th Cir. 1982); *Chemical Manufacturers Association v. NRDC*, 470 U.S. 116, 125-126 (1985). Any other federal agency is not entitled to such deference.

If this Court determines that "Federal Respondent" does indeed represent the view of the Director, OWCP, and therefore is entitled to participate in oral argument, and is entitled to deference, an interesting

question arises. Because this scenario would suggest two inapposite views of the same agency, one view propounded by "Federal Respondent" in its brief on this matter, and the other view propounded by the Director for the last sixteen years, the question arises as to which view should be given deference. This Court has held that an agency's interpretation "which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view". *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 1221 n. 30 (1987). Thus, even if "Federal Respondent" is deemed to be propounding the views of the Director, OWCP, it is respectfully submitted that deference is not due to this new view, but rather deference is due to the Director's longstanding interpretation as outlined in the Longshore Procedure Manual, *supra*.

3. The logical interpretation.

As noted earlier, the argument presented by Federal Respondent, Amicus PHI, and Amicus NAS (Opposition Argument), is substantially the same; only the extent of the argument presented by the various entities differs. This Opposition Argument can be summarized as follows.

Section 33(g)(1) and 33(g)(2) operate together. 33(g)(1) requires that the claimant obtain written approval of a third party settlement any time such settlement is for an amount less than the compensation to which the claimant would be entitled to under the Act. (Fed. Resp. Br. p. 18). 33(g)(2) requires that a claimant give notice to the employer any time such settlement is for an amount greater than the compensation to which the claimant would be entitled to under the Act. *Id.*

While the above argument certainly appears to be a valid alternative to Petitioner's interpretation of Section 33(g), on second glance, it has the same flaw which petitioner addressed in this Brief on the Merits (Pet. Br. pp. 20-21), i.e.; if this is the interpretation that Congress intended, why did they make Section 33(g)(2) disjunctive. Under the opposition argument, Section 33(g)(2) would be rewritten as follows:

> If no written approval of the settlement is obtained and filed as required by paragraph (1) all rights to compensation and medical benefits under this chapter shall be terminated regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Chapter
>
> *or*
>
> If the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Chapter shall be terminated, regardless of whether the employer or employer's insurer has made payments or acknowledged entitlement to benefits under this Chapter.

Since the "written approval of the settlement . . . required by paragraph (1)" is required when a "person entitled to compensation" enters into a settlement with a third person, and since the Opposition Argument suggests that the phrase "person entitled to compensation" refers to any employee, then this interpretation is clearly redundant. This interpretation would mean that 33(g)(2) requires that all employees who do not obtain written approval when they

settle with a third person for less than their compensation entitlement are prohibited from receiving benefits *or* all employees who fail to notify the employer of a third party settlement are denied benefits. It is illogical to state that all claimants who fail to obtain written approval of a third party settlement, *or* all claimants who fail to give notice of a third party settlement, are denied benefits. Surely, Opposition Argument cannot suggest that a claimant could obtain written approval of a third party settlement without giving the employer notice of said settlement.

The only possible way the opposition argument would be logical, would be if the second disjunctive portion of Section 33(g)(2) applied only to those cases where a claimant settled with a third party for more than the compensation to which the claimant would be entitled to under the Act. If 33(g)(2) stated this, than the disjunctive wording of 33(g)(2) could be reconciled with the Opposition Argument because the first disjunctive portion would require written approval of settlements for less than the compensation entitlement, and the second disjunctive portion would require notice be given of settlements for greater than the compensation entitlement.

However, the second disjunctive portion of 33(g)(2) applies "if the employee fails to notify the employer of *any* settlement. . ." Given, as this Court has suggested, that the judiciary should give effect to every word Congress used (See e.g. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *U.S. v. Menasche*, 348 U.S. 528, 538-539 (1955)), and given that Congress chose in enacting Section 33(g)(2) to make that statute disjunctive, it would be illogical for the Court to accept Opposition Argument's interpretation. The

only way that the disjunctive nature of 33(g)(2) makes sense is to interpret the phrase "person entitled to compensation" in 33(g)(1) as meaning something different than the term "employee" in 33(g)(2). The Administrative Law Judges and the Benefits Review Board *have* given the phrase "person entitled to compensation" a different meaning than "employee" and Petitioner respectfully submits that this is the only interpretation by which the disjunctive nature of 33(g)(2) makes sense.

Furthermore, even if this Court chose to ignore the language in the second disjunctive portion of Section 33(g)(2), the Opposition Argument would still be illogical. Remember, the Opposition Argument applies 33(g)(1) to settlements for less than the compensation entitlement, and applies 33(g)(2) to settlements for greater than the compensation entitlement. (Fed. Resp. Br. p. 18). Since 33(f) of the Act states that the employer is only liable for compensation benefits due in excess of the third party settlement, then the employer has no exposure if the claimant settles for greater than the compensation entitlement. How could Congress intend that 33(g)(2) would terminate a claimant's right to compensation benefits if the claimant settled for more than the compensation entitlement without giving notice, when the claimant who settles for more than the compensation entitlement is not due any compensation benefits from the employer pursuant to 33(f).

4. The historical interpretation.

Federal Respondent makes an interesting point that Petitioner's interpretation of "person entitled to compensation"makes no sense under Section 33(g) as enacted in 1927 because, at that time, claimant had to

elect whether to sue a third party in tort or to collect compensation under the Act, but not both. (Fed. Resp. Br. p. 20). Federal Respondent notes that because of the election process, a claimant could not be receiving compensation while he was suing a third party. *Id.* Where Federal Respondent's argument is flawed is that it suggests that Petitioner defines "person entitled to compensation" as only a person who is actually receiving compensation. This is not what Petitioner's argument says. Petitioner defines "person entitled to compensation" as a person to whom the employer has acknowledged compensation liability. *O'Leary* and its progeny determined that a good benchmark to use in determining when an employer has acknowledged compensation liability is when the employer is either actually paying compensation benefits or has been judicially ordered to pay compensation benefits.[1] *O'Leary* and its progeny are clearly

[1] See eg. *O'Leary v. Southeast Stevedore Company*, 5 BRBS 161 (ALJ, 1976), 7 BRBS 144 (1977), *aff'd. mem.* 622 F.2d 596 (9th Cir. 1980)(unpublished); *Caranante v. International Terminal Operating Company, Inc.*, 7 BRBS 248 (1977); *Wall v. Wall*, 15 BRBS 197 (ALJ, 1982); *Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd. mem.* 729 F.2d 757 (5th Cir. 1984)(unpublished); *Todd v. J & M Welding Contractors*, 16 BRBS 434 (ALJ, 1984); *Wilson v. Triple A Machine Shop*, 17 BRBS 471 (ALJ, 1985); *Lindsay v. Bethlehem Steel Corporation*, 18 BRBS 20 (1986), 22 BRBS 206 (1989); *Dorsey v. Cooper Stevedoring Company, Inc.*, 18 BRBS 25 (1986); *Nesmith v. Farrell American Station*, 19 BRBS 176 (1986); *Cernousek v. Braswell Shipyards, Inc.*, 19 BRBS 796 (ALJ, 1987); *Quinn v. Washington Metropolitan Area Transit Authority*, 20 BRBS 65 (1986); *Lewis v. Norfolk Shipbuilding and Dry Dock Corporation*, 20 BRBS 126 (1987); *Evans v. Horne Brothers, Inc.*, 20 BRBS 226 (1988); *Mobley v. Bethlehem Steel Corporation*, 20 BRBS 239 (1988), *aff'd.* 24 BRBS 49, 920 F.2d 558 (9th Cir. 1990); *Blake*

in accord with the intent of Section 33(g) as it was enacted in 1927, as will be discussed infra.

To understand how 33(g) fit into the original enactment of the Act, it is necessary to identify the potential claimants who could be injured in a work accident. The first type of claimant would be the person who is injured on the job but is not entitled to compensation. Two situations immediately come to mind; (1) the claimant who contracts an occupational disease such as asbestosis but is not currently disabled, and (2) the claimant who suffers a non-disabling injury on the job through the fault of a third party, and is therefore entitled to recover for pain and suffering from the third party, but is not entitled to compensation because he is not disabled and has not missed any work. These claimants are not entitled to compensation under the Act. Therefore, since the employer will not, and should not, acknowledge entitlement to compensation, the claimant has no election under the 1927 Act. The claimant's only alternative in this situation is to sue the third party in tort. While claimant was injured on the job, and is an employee,

v. Bethlehem Steel Corporation, 21 BRBS 49 (1988); *Castorina v. Lykes Brothers Steamship Company, Inc.*, 21 BRBS 136 (1988); *Anweiler v. Avondale Shipyards, Inc.*, 21 BRBS 271 (1988); *Armand v. American Marine Corporation*, 21 BRBS 305 (1988); *Fisher v. Todd Shipyards Corporation*, 21 BRBS 323 (1988); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988); *Cunningham v. Kaiser Steel Corporation*, 21 BRBS 154 (ALJ, 1988); *Picinich v. Lockheed Shipbuilding*, 22 BRBS 289 (1989); *Glenn v. Todd Pacific Shipyards Corp.*, 22 BRBS 254 (ALJ, 1989); *Sellman v. I.T.O. Corporation of Baltimore*, 24 BRBS 11 (1990); *Cretan v. Bethlehem Steel Corporation*, 24 BRBS 35 (1990); *Reaux v. H & H Welders & Fabricating*, 24 BRBS 7 (ALJ, 1990).

application of Section 33(g) to this claimant would be illogical because why would Congress require that a claimant receive the employer's written approval of a settlement made with a third party when the employer has no exposure for the injury. Thus, the term "person entitled to compensation", even in 1927, clearly envisioned a class of claimants smaller than all employees injured on the job.

A second type of claimant would be a person who suffers a disabling injury on the job through the fault of a third party, and for whom the employer acknowledges liability under the Act. Just because the employer acknowledges liability, this does not affect the claimant's ability under the 1927 Act to elect his remedy. The claimant can elect to sue the third party, and collect compensation under 33(f) in excess of any settlement or judgment, or the claimant can elect to take the acknowledged compensation benefits, and automatically assign his rights against the third party to the employer. In this situation, where the employer has acknowledged liability, Section 33(g) applies. It is logical for Congress to require that the employer approve any settlement the claimant makes with a third party for less than the compensation due because in this case the employer faces exposure under 33(f) if the claimant settles for too little. Thus, 33(g) protects the employer from the risk that the claimant will take too small a settlement from the third party knowing that he can still collect the excess from the employer.

The more difficult situation is a third type of claimant who suffers a disabling injury on the job through the fault of a third person but whom the employer fails to acknowledge is disabled. The employer's refusal to acknowledge liability can be seen as a de-

facto election by the employer for the employee, because the employee is certainly not going to elect to receive compensation benefits from an employer who is refusing to pay. Thus, the employee is forced to elect to sue the third party, thereby foregoing his right to compensation. Is it logical for this claimant to be required to seek the approval of a third party settlement from the employer who has refused to acknowledge liability under the Act? Petitioner respectfully submits that it is not. Petitioner's position is buttressed by further examination of the 1927 Act.

As noted earlier, if the claimant elected to take compensation under the 1927 Act, this resulted in an automatic assignment of claimant's rights against the third party to the employer. Section 33(b), 44 Stat. 1440. Notably, this assignment of rights was based on claimant's "acceptance" of compensation, not "entitlement" to compensation. Acceptance of compensation benefits implies that either the compensation benefits were offered by the employer, or that the employer was judicially ordered to pay such benefits. Thus, acceptance of benefits necessarily must come after the claimant's right to benefits was acknowledged.

This Court has held that the Act is to be construed in order to further its purpose of compensating longshore and harbor workers. *Voris v. Eickel*, 346 U.S. 328, 333 (1953); *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249, 268 (1977). The above interpretation fostered this purpose in the 1927 Act by protecting employers who acknowledged the injured worker's entitlement to compensation and afforded said claimants the opportunity to accept compensation in lieu of having to face the risks involved

in pursuing a lawsuit. 33(b) protected such employers by providing for an automatic assignment of the claimant's rights against a third party to employers who acknowledged claimant's entitlement under the Act. Such automatic assignment of rights was not provided to employers who had not acknowledged claimant's entitlement. Is it any less logical that the protection afforded by 33(g) would similarly be provided to employers who had acknowledged claimants entitlement, and not be provided to employers who had not acknowledged claimant's entitlement. By protecting such employers, Congress encouraged employers to accept their responsibility under the Act, thus furthering the intent of the Act.

As the above discussion shows, it is clearly more logical that the term "person entitled to compensation" under the 1927 Act was envisioned to mean a claimant whom the employer has acknowledged is disabled under the Act. When seen in this light, the interpretation under *O'Leary* and its progeny makes perfect sense, especially considering the extensive changes that have taken place in the Act since its original enactment.

As noted in Petitioner's Brief on the Merits (p. 11), Congress amended 33(a) in 1959 to get rid of the election process, recognizing the inequity of a statute that purported to give the employee an election, while actually giving a de-facto election to the employer.

> "...in exercising his right to sue a third party for damages under section 33 of existing law, the employee must choose whether to collect the compensation to which he is entitled or to pursue the third party suit. He may not pursue both courses.

> Existing law works a hardship on an employee by in effect forcing him to take compensation under the Act because of the risks involved in pursuing a lawsuit against a third party..."
>
> J.A. 7, p. 121.

With the excision of the election requirement, claimants no longer had to choose whether they were proceeding under tort or under the Act. Thus, it became increasingly more difficult to determine whether the employer had acknowledged entitlement under the Act. Before the excision, it was relatively easy to determine when employers were acknowledging liability under the Act because the claimant had to declare to the OWCP whether or not he was accepting compensation benefits. Now that claimants no longer had to make this election, the judiciary needed some way of determining when the employer had actually acknowledged claimant's entitlement under the Act so that the protection afforded by 33(g) could be enforced.

The judiciary resolved this problem by looking to when it could be certain that the employer had acknowledged the claimant's entitlement under the Act, i.e., when the employer was either actually paying compensation to the claimant, or had been judicially ordered to pay such compensation. Since that initial determination, the judiciary has been universal in its acceptance of this interpretation of 33(g). (See footnote 1).

5. The judiciary supports Petitioner's position.

Despite the universal acceptance of Petitioner's position, the Opposition Argument suggests that Petitioner's interpretation has no judicial support. In-

deed, Amicus NAS goes so far as to admit that the Director's Longshore Procedure Manual supports Petitioner's position, but then discounts the manual's interpretation as not expressing "either strong conviction or an immutable position", noting that the manual states "judicial interpretation may be necessary to resolve the issue". (Amicus NAS Br., p. 14).

If the sixteen years of Administrative Law Judges and Benefits Review Board decisions cited above are not sufficient enough of a judicial interpretation to satisfy Amicus NAS, then surely the Ninth Circuit decisions in *O'Leary v. Southeast Stevedore Company*, 622 F.2d 596 (9th Cir. 1980)(unpublished) and *Mobley v. Bethlehem Steel Corporation*, 920 F.2d 558 (9th Cir. 1990) and the Fifth Circuit decision in *Kahny v. Arrow Contractors of Jefferson, Inc.*, 729 F.2d 757 (5th Cir. 1984)(unpublished) should be sufficient. While the Opposition Argument notes that the Ninth Circuit's local rules do not recognize unpublished decisions as precedent, none of the opposition arguments can point to a Ninth Circuit decision which is contrary to *O'Leary* and *Mobley*. As for *Kahny*, the Fifth Circuit local rules do recognize unpublished decisions as precedent, and thus *Kahny* was precedent in the Fifth Circuit until overruled by the captioned matter. FRAP Loc. R. 47:5.3.

Furthermore, it has come to petitioner's attention that the United States Court of Appeals for the Fourth Circuit has recently come out with a decision that supports petitioner's position. In *ITO Corporation of Baltimore v. William Sellman; and Director, OWCP*, No. 90-1531 (January 22, 1992) (Supp. App. 2), William Sellman was injured while working on the vessel ALGENIB for ITO's predecessor. ITO voluntarily paid compensation benefits for total disability until July 21, 1984. At that time, ITO refused to make any further payments because Sellman had not transferred to ITO funds he received from a settlement of his third party suit.

In support of its decision to discontinue compensation benefits, ITO argued that the plain language of Section 33(g) requires that it discontinue compensation benefits because Mr. Sellman did not obtain ITO's written approval of the agreement. The Fourth Circuit noted that:

> "The purpose of Section 33(g) is to protect employer 'against his employee accepting too little for his cause of action against a third party'. In other words, the written approval requirement prevents the claimant from acting unilaterally to the detriment of the employer by accepting less in settlement than it might be entitled to and thus reducing the employer's offset.
>
> "We agree with claimant and the board that the purposes of Section 33(g) would be ill-served by permitting the termination of benefits where employer has directly insured, by its own action, the protection of its offset rights. In this case, ITO directly participated in the third party action against the ALGENIB defendants. . ."

The Fourth Circuit continued:

"Our holding that employer may not terminate benefit payments is not grounded in the view that employer is estopped to deny that it gave written approval in this case. Rather, employer's conduct in this case rendered Section 33(g) inapplicable. The language of the statute supports this con-

struction. Section 33(g) contemplates a situation where the person entitled to compensation reaches a settlement with a third party. This language reflects the concern alluded to earlier over unilateral action which is detrimental to the employer. Conspicuously, the statute contains no reference to written approval or notice requirements where the employer participates in the settlements. Accordingly, we conclude that written approval is unnecessary under such circumstances."

As petitioner noted in its brief on the merits (p. 5):

"Administrative Law Judge Parlen L. McKenna held that Section 933(g) did not preclude compensation benefits under the situation at bar; Nicklos' participation in the settlement agreements sufficed as notice under Section 33(g)(2) irrespective of the fact that Coward had not garnered Nicklos written approval."

Clearly, the fact situation in the case at bar, i.e., the participation of Nicklos in the settlement agreement between Cowart and Transco, is directly analogous to the Fourth Circuit decision in *Sellman, supra.* Thus, it is respectfully submitted that *Sellman* is Fourth Circuit precedent which supports petitioner's position that written approval is not necessary under 33(g) when the employer/carrier participates in the third party settlement agreement.

6. The legislative history is silent.

While discounting the sixteen years of judicial interpretation in accord with Petitioner's position as not being precedent, the Opposition Argument cites very little in support of its own interpretation. In support

of their position, all of the Opposition briefs cite as "legislative history" the Oversight Hearings before the Senate and the House of Representatives for the four years prior to the enactment of the 1984 amendments. These hearings were open to participation by all parties interested in the amendments to the Act, and are filled with statements issued by biased parties on both sides of the issue. Whatever impact these hearings may have had on the final enactment of the amendments in 1984 is unclear. Opposition Arguments surmise that because their position was advanced by certain parties during these hearings, than these statements were the impetus which propelled Congress to enact 33(g)(2) in its current form. The fact of the matter is that this "legislative history" cited by the Opposition Argument, is "legislative history" of amendments in 1981-1983, that were ultimately rejected by Congress. The true legislative history of the amendments passed in 1984 is silent as to the intent behind 33(g)(2). To suggest otherwise is misleading to this Court.

CONCLUSION

As the foregoing argument clearly demonstrates, Petitioner's interpretation of the language "person entitled to compensation" is the only logical interpretation from both a purely linguistic view, as well as from a historical view. The LHWCA has always been construed as social legislation to ensure that injured workers would get prompt relief from their employers. The interpretation propounded by Respondents and their Amicus, would lead to harsh results not intended by Congress. Indeed, Federal Respondent readily admits that the construction they

give 33(g) could lead to hardship for many claimants. (Fed. Resp. Br., pp. 34-36). Nevertheless, Federal Respondent feels that such difficulties do not justify a departure from the clear language of the statute. *Id.*

Petitioner respectfully submits that the clear language of the statute can, and has been, interpreted in a way which would not lead to harsh results for claimants. This construction, adopted by *O'Leary* and its progeny, is the only interpretation which makes sense to the overall scheme of the Act. The Fifth Circuits construction of 33(g) in the captioned matter cannot logically, historically, or morally stand.

Respectfully submitted,

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APPENDIX

Supplemental Appendix 1

9. **Consent.** Section 33(g)(1) of the Act requires the written approval of the employer for any settlement which is less than the amount to which the employee would be entitled to under the Act. If written approval is not received before the settlement, the employee's right to future compensation is terminated. Form LS-33 is used to obtain this written approval. However, written approval is only necessary when an employee is entitled to compensation. The term "entitled to compensation" has been interpreted to mean that the employee is being paid by the EC either voluntarily or pursuant to an award of compensation. If the employee is not receiving compensation, Section 33(g)(2) merely requires that the employee give the employer notice of the settlement. The issue of consent to a settlement can be a complex matter. Judicial interpretation may be necessary to resolve the issue. (See LHWCA CIRCULAR 86-03, 5-30-86)

Supplemental Appendix 2

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1531

I.T.O. CORPORATION OF BALTIMORE,
Petitioner,

v.

WILLIAM SELLMAN; DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

SYLLABUS

The Fourth Circuit, concluding that written approval by employer of a third-party settlement was unnecessary where employer directly insured, by its own action, the protection of its offset rights, affirmed the Board's decision on this issue. Employer directly participated in the third-party action and fully participated in the negotiations leading to the execution of the settlement. Therefore, the court held that employer may not terminate benefit payments.

The court found that employer was entitled to an offset under Section 33(f), as the evidence did not support the conclusion that employer intended to waive its lien. Therefore, the court reversed the Board's holding to the contrary and held that employer was entitled to offset its liability against the third-party settlement recovery.

On Petition for Review of an Order
of the Benefits Review Board
(No. 87-1913)

Argued: April 10, 1991

Decided: January 22, 1992

Before RUSSELL, Circuit Judge, CHAPMAN, Senior Circuit
Judge, and WILLIAMS, United States District Judge for the
Eastern District of Virginia, sitting by designation.

ARGUED: Stan Musial Haynes, Rudolph Lee Rose, SEMMES, BOWEN & SEMMES, Baltimore, Maryland, for Petitioner, Joshua T. Gillelan, II, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Respondent Director; Paul David Bekman, ISRAELSON, SALSBURY, CLEMENTS & BEKMAN, Baltimore, Maryland, for Respondent Sellman. **ON BRIEF:** Robert P. Davis, Solicitor of Labor, Carol A. De Deo, Associate Solicitor, Janet R. Dunlop, Counsel for Longshore, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Respondent Director; Laurence A. Marder, ISRAELSON, SALSBURY, CLEMENTS & BEKMAN, Baltimore, Maryland, for Respondent Sellman.

RUSSELL, Circuit Judge:

This case arises out of a claim filed under the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. §§ 901-950 (1986). Employer, I.T.O. Corporation of Baltimore ("I.T.O."), appeals from a decision of the Benefits Review Board ("Board") affirming an administrative law judge's (ALJ) decision denying I.T.O.'s request to terminate compensation and medical benefit payments or, alternatively, to offset its liability against settlement proceeds received by the claimant, William Sellman, through a third-party

settlement agreement. We agree with the Board that I.T.O. may not terminate benefit payments, but reverse its determination that I.T.O. is not entitled to an offset.

There is no dispute in this case concerning William Sellman's disability status. Sellman suffered a fall on July 10, 1979, while working on a ship known as the *Algenib* for I.T.O.'s predecessor, resulting in a fractured skull and paralysis. I.T.O. voluntarily paid compensation and medical benefits for total disability from July 11, 1979, until July 21, 1984. I.T.O. refused to make further payments after this date because Sellman refused to transfer to I.T.O. funds he received from a settlement of his third-party suit against the owners of the *Algenib*.

I.T.O., Sellman, and his wife[1] and children filed suit against the *Algenib* defendants in 1982 which culminated in two settlement agreements executed in June 1984. One agreement ("I.T.O. agreement") called for the payment of $250,000 to I.T.O. The agreement provided that it would have "no force and effect" until "the companion Settlement Agreement of the Sellmans is approved by the Circuit Court for Baltimore County ...." The I.T.O. agreement was signed by Mrs. Sellman, William's attorney, and the attorneys for I.T.O. and the *Algenib* defendants.

The second agreement ("Sellman agreement") required the *Algenib* defendants to pay $250,000 to the Sellmans in satisfaction of any claims against them. The Sellmans had filed nine causes of action against the *Algenib*, including one cause of action for loss of consortium. The Sellman agreement was signed by Mrs. Sellman, the Sellmans' attorney, Roger Smith, and the attorney for the *Algenib* defendants, Geoffrey Tobias. Like the I.T.O. agreement, the Sellman agreement was contingent upon approval by the Baltimore Circuit Court. Both agreements referenced I.T.O.'s alleged compensation lien. At the time

[1] Sellman's wife was appointed as his legal guardian in 1982.

the settlements were reached, I.T.O. had a lien of over one-half million dollars, which was growing at a rate of over $100,000 a year.

The provision requiring approval by the circuit court was requested by the ship owners, because Mr. Sellman was under guardianship protection and the Baltimore County Circuit Court was the court which had approved Mrs. Sellman as Mr. Sellman's legal guardian. Pursuant to this requirement of the settlement agreements, Mr. Smith drafted a Petition to Compromise Claim for submission to the Baltimore County Circuit Court. The Petition was drafted after the settlement agreements were executed and contained provisions which differed significantly from the provisions of the settlement agreements. Whereas the settlement agreements were silent as to whether I.T.O. had the right to suspend compensation payments, or to receive an offset against the proceeds of the Sellman settlement, the petition stated that I.T.O. had agreed to continue compensation and medical payments without interruption and that none of the proceeds of the Sellman agreement were subject to offset because they were intended solely to compensate Mrs. Sellman for loss of consortium. The petition submitted to the Baltimore County Circuit Court resulted in approval of the Sellman agreement.

In finding that I.T.O. was required to continue making both compensation and medical payments, the ALJ found that the petition was incorporated into the settlement agreements, and relied on this document and testamentary evidence to find that the parties in fact intended that I.T.O. continue making payments without interruption. The ALJ further found that the circumstances of this case obviated Mr. Sellman's responsibility under 33 U.S.C. § 933(g) to file a government form known as Form LS-33 reflecting I.T.O.'s written approval of its third-party settlement agreement. Finally, the ALJ determined that the

proceeds of the Sellman agreement were for loss of consortium and thus not subject to offset.

The Board unanimously upheld the ALJ's determination that I.T.O. was not entitled to terminate benefit payments. The Board reasoned that the requirement of section 33(g) that a claimant obtain employer's written approval of any settlement claimant reached with a third party was inapplicable where, as in this case, employer was both a party to the third-party suit and helped negotiate the settlement reached between claimant and the third-party. The Board noted that, in any event, I.T.O. would have no right to terminate medical benefit payments because the statute only permitted termination of medical benefits where claimant failed to either obtain employer's written approval of the settlement or notify employer of the settlement, and there was no question that I.T.O. received notice of the Sellman agreement.

A majority of the Board also affirmed the ALJ's finding that I.T.O. was not entitled to offset the proceeds of the Sellman agreement against its liability under the Act. The majority found that since the settlement agreements were ambiguous as to whether I.T.O. had waived its statutory right to an offset, the ALJ properly relied on extrinsic evidence to determine the intentions of the parties and that substantial evidence supported his findings regarding the intentions of the parties.

One Board member dissented from the majority's determination regarding the offset issue. The dissenting Board member felt that I.T.O. had the right to either collect the entire $500,000 paid by the *Algenib* defendants immediately or to receive a credit against its future liability by suspending payments until its full offset was realized. The dissent also took the position that the petition to compromise claim was a separate document from the settlement agreements whose only purpose was to request the circuit court to approve the Sellman agreement, and

that the circuit court's order did not approve the petition, but the Sellman agreement. Finally, the dissent argued that the ALJ's findings regarding the intention of the parties were not supported by substantial evidence because the ALJ had misconstrued relevant testimony.

Under 33 U.S.C. § 933(a), an employee entitled to compensation under the Act need not elect to pursue his worker's compensation claim to the exclusion of a negligence action against a third party. If, however, recovery is obtained from the third party, employer is entitled to offset its liability under the Act against such recovery pursuant to 33 U.S.C. § 933(f). Section 33(g), 33 U.S.C. § 933(g), deals with situations where the claimant settles his third-party action. That section provides, in pertinent part:

> If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. § 933(g)(1).

Subsection 2 of section 33(g) states the consequences for failing to obtain the employer's written approval:

> If no written approval of the settlement is obtained and filed as required by paragraph (1), or

> if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. § 933(g)(2).

In this appeal, I.T.O. argues that the Board erred by ignoring the plain language of the statute and pertinent case law in denying I.T.O. the right to terminate benefits. I.T.O. argues that since Mr. Sellman did not obtain I.T.O.'s written approval of the Sellman agreement and indisputably failed to file the required LS-33 form in a timely manner, the statute requires that benefit payments terminate. I.T.O. further contends that the Board erred by finding that its participation in the third-party action and settlement negotiations rendered section 33(g) inapplicable, relying on case authorities holding that section 33(g)'s written approval requirement is to be strictly enforced without exceptions. I.T.O. further relies on case authorities holding that the legislative history underlying the addition of subsection (2) and its termination provisions to section 33(g) indicate that its purpose was to preclude debate over whether an employer's conduct amounted to the equivalent of written approval and thus estopped it from denying that it had given written approval.

We find these arguments unpersuasive. The purpose of section 33(g) is to protect employer "against his employee accepting too little for his cause of action against a third party." *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968); *Robinson Terminal Warehouse Corp. v. Adler*, 440 F.2d 1060, 1062 (4th Cir. 1971). In other words, the written approval requirement prevents the claimant from acting unilaterally to the detriment of the employer

by accepting less in settlement than it might be entitled to and thus reducing employer's offset.

We agree with claimant and the Board that the purposes of section 33(g) would be ill served by permitting the termination of benefits where employer has directly insured, by its own actions, the protection of its offset rights. In this case, I.T.O. directly participated in the third-party action against the *Algenib* defendants, and fully participated in the negotiations leading to the execution of "companion" settlement agreements which, as the Board stated, "were so intermeshed that they could be considered a joint settlement." After all this, and after accepting the settlement proceeds from the I.T.O. agreement, I.T.O. refused to give its written approval of the Sellman agreement.

Our holding that employer may not terminate benefit payments is not grounded in the view that employer is estopped to deny that it gave written approval in this case. Rather, employer's conduct in this case rendered section 33(g) inapplicable. The language of the statute supports this construction. Section 33(g) contemplates a situation where "the person entitled to compensation" reaches a settlement with a third party. This language reflects the concern alluded to earlier over unilateral action which is detrimental to the employer. Conspicuously, the statute contains no reference to written approval or notice requirements where the employer participates in the settlements.[2] Accordingly, we conclude that written approval is unnecessary under such circumstances.

We next address whether I.T.O. is entitled to an offset under section 33(f). The Board determined that a provision in the I.T.O. agreement stating that responsibility for sat-

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[2] We also agree with the Board that I.T.O.'s reliance on cases where the written approval requirement was upheld despite employer's participation in the third-party suit is misplaced since, in those cases, employer opposed the settlement.

isfaction of I.T.O.'s lien "remains with Mr. Sellman in the event that there is any recovery of any sums of money from any other party not named as a Defendant herein" could reasonably be interpreted as waiving I.T.O.'s right to offset the proceeds of Mr. Sellman's settlement with the *Algenib* defendants. The Board majority therefore concluded that the contract was ambiguous as to whether I.T.O. intended to waive its right to an offset, justifying circumvention of the parol evidence rule and permitting examination of extrinsic evidence, namely, the petition and the testimony of the attorneys involved in the case, to determine the intention of the parties. Even if we agreed with the Board's conclusion that the provision in the I.T.O. agreement was ambiguous, we find that the petition and relevant testimony do not support the conclusion that I.T.O. intended to waive its lien.

Initially, we agree with the dissenting Board member that the ALJ committed legal error in finding that the petition augmented the I.T.O. and Sellman agreements. The purpose of the petition was to obtain court approval of the *Sellman* agreement, and review of the petition and the circuit court's order discloses that this was the only result achieved. Paragraph 7 of the petition informed the court that the *Algenib* defendants, "in settlement of all claims of William H. Sellman, Jr.," offered a sum of $250,000. Paragraph 9 states that I.T.O. agreed to accept $250,000 in settlement of its claims against the *Algenib* defendants, and that I.T.O. will remain liable for all indemnity so that benefits "will not be interrupted." Paragraph 10 provides: "Rhoda Sellman, individually and on behalf of her minor children . . . under the loss of consortium claims . . . have also been negotiated and settled for the sum of [$250,000], *separate and apart from these proceedings*" (emphasis added).

The circuit court's order makes no reference to the matters contained in paragraphs 9 or 10. Rather, the court's order merely authorizes Mrs. Sellman and her attorneys

to accept the $250,000 offer of the *Algenib* defendants "in full settlement of all claims of William H. Sellman" arising out of his injuries on the ship. Thus, the court's order reflects the fact that the court had no reason or authority to approve paragraphs 9 and 10 of the petition. Moreover, we find it particularly unlikely that the court would have approved paragraph 10, since it referred to an agreement which does not appear to exist and since, in any event, the petition states that Rhoda's alleged settlement was "separate and apart from these proceedings." [3]

Once paragraphs 9 and 10 of the petition are removed from consideration, there is no documentary evidence indicating that I.T.O. intended to waive its right to an offset. In finding that I.T.O. intended to waive its lien, however, the ALJ also relied heavily on testimony by Mr. Tobias to the effect that the parties intended that benefit payments to Mr. Sellman would continue, despite the Sellman settlement, without interruption. The majority of the Board found that the ALJ acted within his discretion in determining which testamentary evidence to credit. We agree, however, with the dissenting Board member that the ALJ misconstrued the testimony of Mr. Tobias.

Mr. Tobias testified that it was his understanding that under the agreements benefit payments were to continue, and mentioned at one point in his testimony that in a discussion with Mr. Hennegan, I.T.O.'s attorney, at a cocktail party in October 1984, Hennegan agreed with him as to his understanding on this point. As pointed out by the dissent, Mr. Tobias later corrected his statement, testifying that "I do not think the words continuation of compensation payments were mentioned by either of us and if, I

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[3] We also reject William's contention that I.T.O. ought to be bound by the terms of the petition because it never objected to its provisions despite being sent a copy. I.T.O. was not a party to the guardianship proceeding before the circuit court, and had no duty to object to the contents of the petition.

think I may have suggested that, that if those words were expressed in the conversation, they certainly were not." Mr. Tobias further testified, more generally, that Mr. Hennegan never said anything to him about the continuation of payments. Even Sellman's attorney, Mr. Smith, conceded that the suspension of benefits was never discussed with I.T.O.'s representatives.

We note the Director's position that I.T.O. cannot recover its offset because at least some portion of the Sellman settlement proceeds must have been for loss of consortium by virtue of the fact that Mr. Sellman's family members were parties to the agreement, and I.T.O. failed to prove what portion of the proceeds were solely for William. We disagree. The Sellmans brought nine different causes of action against the *Algenib* defendants, only one of which was for loss of consortium. Since the Sellman agreement makes no attempt to match specific portions of the proceeds with specific causes of action, there is no way to determine what, if any, portion of the settlement was for loss of consortium. The Board has specifically upheld the employer's right to a total offset unless the settlement agreement specifically apportions the amounts intended for the claimant and the amounts intended for family members. *See Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989). To accept the Director's position would require this Court to rewrite the Sellman agreement, which we cannot do. *See Kasten Constr. Co., Inc. v. Rod Enters., Inc.*, 301 A.2d 12 (Md. 1973). *See also Automatic Retailers of Am., Inc. v. Evans Cigarette Serv. Co.*, 304 A.2d 581 (Md. 1973).

The Director also contends that I.T.O. is barred from recovering an offset because it indisputably waived its "lien" when it chose not to enforce its right to have the $250,000 in proceeds from the Sellman agreement transferred directly to itself. Instead, I.T.O. agreed to allow the funds to go to the Sellmans and simply ceased payments until its retained payments equaled the net value

of the settlement. The Director avers that the lien waiver is rendered illusory if it is held that I.T.O. waived its lien, but did not waive its right to a credit for the very amount it could have collected immediately.

Section 33(f) provides no basis for treating employer's right to an offset differently depending on the amount of time it takes to collect it. Moreover, an employer's decision to suspend benefit payments until it exhausts its credit provides claimants incentive to enter into a third-party settlement. By exercising its right to offset in this manner, employers alow the claimant to receive a large lump sum immediately rather than have the same funds disbursed to him in smaller increments over a period of time. This permits the claimant to use some of the funds to produce further income.

In cases where he claimant's third-party recovery exceeds employer's liability at the time of the recovery, the employer ceases benefit payments until such time as the claimant's continuing medical expenses exceed the amount of the third-party recovery. *See Shoemaker v. Schiavone and Sons, Inc.*, 20 BRBS 214 (1988). The only factor which distinguishes this case from those areas is that here I.T.O. could have collected the entire $250,000 immediately because the amount of its liability was known. We see no reason to penalize an employer for voluntarily collecting its offset over a period of time. Such a practice aids employers by encouraging claimants to pursue third-party recoveries, and aids claimants by permitting them to receive a lump sum which may be utilized to produce further income.

Accordingly, the decision of the Board is affirmed in part and reversed in part. I.T.O. may not terminate either compensation or medical benefit payments, but is entitled

to offset its liability against William's third-party settlement recovery.

AFFIRMED IN PART AND REVERSED IN PART